

ARTICLE

ELITES, SOCIAL MOVEMENTS, AND THE LAW: THE CASE OF AFFIRMATIVE ACTION

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Contributing to the growing legal literature on social movements and constitutional culture, this Article uses the widespread public mobilization that occurred around Grutter v. Bollinger and Gratz v. Bollinger as a point of departure for its analysis. These cases are apt for such a discussion because they generated scores of amicus briefs and numerous public opinion polls and, most important for this analysis, featured a group of intervenors styling itself a “mass movement” for social justice. Taking an interdisciplinary approach, this Article considers the Grutter intervenors’ experience in light of social movement history and the social science and legal literature on mass movements. Challenging the legal literature, this Article concludes that social movements and juridical law are fundamentally in tension. The legal literature assumes not only that the two are compatible, but also that rights talk is especially inspirational to, and efficacious for, social movements. This view overlooks an important distinction between the definitional and inspirational roles that law in the courts can play in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although less successfully than legal mobilization theorists assume. But social movements that define themselves through law risk undermining their insurgent role in the political process, and thus losing their agenda-setting ability. Viewed within this framework, the Grutter “mass movement” failed to significantly impact the constitutional order. Instead, the intervenors engaged in a single-issue political and legal reform campaign, which achieved only moderate success. Their limited success demonstrates the tension between social movement tactics and litigation as tools of social change.

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INTRODUCTION

Supreme Court opinions are forms of public discourse that both shape and reflect national debates about controversial subjects, including race. For this reason, identifying the voices in legal discourses about race, listening to their stories, and connecting them to themes in the Court's equal protection jurisprudence can be illuminating. This exercise can reveal much about both political and constitutional cultures.

*Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² the University of Michigan affirmative action cases, underscore this point. Robert Post aptly characterizes the dynamic between the legal and political cultures in the Michigan decisions: “[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”³ Post notes, for example, that the “beliefs and values of non-judicial actors” heavily influenced the Court’s result in *Grutter*.⁴ Surely, Post’s insights are correct.

This Article expands on the observation that constitutional law and culture are mutually reinforcing by exploring questions concerning the nature and consequences of this dialectic. Which beliefs and values of nonjudicial actors affect the Court? How are their values reflected in the Court’s opinions? What does the dialectical process by which cultural norms influence constitutional norms suggest about the relationship between law and democracy? These are complex questions, and this Article does not purport to address all of them completely. Instead, it begins a conversation that uses these questions as points of departure for analyzing *Grutter* and *Gratz* from sociopolitical and cultural perspectives,⁵ and

1. *Grutter* endorsed the consideration of an applicant’s race in university admissions in order to admit the “critical mass” of minority students necessary to achieve the educational benefits that flow from a diverse student body—provided that each applicant is subject to an individualized assessment of qualifications. *Grutter*, 539 U.S. at 327–43. *Grutter* (and *Gratz*) reaffirmed *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (holding that race may be used to further compelling state interest of diversity in higher education, provided universities do not rely on racial quotas).

2. In *Gratz*, the Court found unconstitutional an admissions policy in which minority applicants were automatically awarded bonus points because of their race. 539 U.S. 244, 274–75 (2003).

3. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 8 (2003). See generally Paul W. Kahn, *The Cultural Study of Law* 27–30 (1999) (arguing that “legal order . . . is a constructed social world” whose constitutive elements should be analyzed for what they reveal about citizens’ understandings of time, space, community, and authority).

4. Post, *supra* note 3, at 8.

5. Doctrinal analyses have dominated both legal and popular commentary on the cases. For legal commentary, see, for example, David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 Fla. L. Rev. 483 (2004) (discussing *Grutter* and *Gratz* analysis of strict scrutiny requirements); Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 Colum. L. Rev. 1634, 1634–37 (2003) (discussing limiting nature of the Court’s strict scrutiny analysis); David I. Levine, *Public School Assignment Methods After Grutter and Gratz: The View from San Francisco*, 30 Hastings Const. L.Q. 511, 514–24 (2003) (arguing that uncertainty resulting from *Grutter* and *Gratz* will lead schools to adopt race-neutral assignment plans); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945 (2004) (suggesting that *Grutter* and *Lawrence v. Texas*, 539 U.S. 558 (2003), indicate a shift in the Court toward new formalist analysis). For similar commentary in the media, see Linda Greenhouse, *In a Momentous Term, Justices Remake the Law*, and the Court, N.Y. Times, July 1, 2003, at A1 (observing that the Court viewed affirmative action plan in *Gratz* as overly mechanical); Adam Liptak, *Affirmative Action Proponents Get the Nod in a Split Decision*, N.Y. Times, June 24, 2003, at A26 (noting importance of differences in

considers, in particular, what the cases suggest about the relationship between law and social movements. Based on my analysis of the cases and the sociopolitical dynamics around them, I contend that social movements—defined as politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital⁶—are generally incompatible with constitutional litigation.⁷ My argument primarily rests not on assumptions about the institutional capacity of courts to produce change, a topic that has been considered many times by others,⁸ but on observations about the nature and purposes of social movements themselves. In short, progressive social movements should not make juridical law definitional to their campaigns for social justice. To date, the legal literature has failed to appreciate the tension between social movements and the law, and thus has overstated the utility of juridical law to movements for social justice.⁹

The affirmative action cases are excellent texts to consider from a social movement perspective because they featured a group of intervenors in *Grutter* who styled themselves a “mass movement” for social justice.¹⁰ The presence and tactics of the *Grutter* intervenors, juxtaposed with those of more established elite interest groups involved in the litigation,¹¹ drive my analysis of the relationship among social movements, elites,¹² and the law. From a social movement perspective, the interven-

affirmative action processes in Court’s appraisal of constitutionality). Analyses that focus on the political significance of the cases, as well as the doctrine, include Barbara J. Flagg, *Diversity Discourses*, 78 Tul. L. Rev. 827, 828–31 (2004) (discussing impact of *Grutter* on popular affirmative action discourse); Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113 (2003) [hereinafter Guinier, *Admissions Rituals*]; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 964–68 (2002) (published prior to Supreme Court decisions) (arguing for political approach to transforming public consciousness surrounding affirmative action).

6. I explicate this definition of social movements *infra* Part III.C.

7. See *infra* Part III.

8. See sources cited *infra* notes 25–26.

9. See *infra* Part III.

10. See *The Story of the Founding Conference of the New Civil Rights Movement*, *Liberator*, Sept. 2001, at 3, 7, available at <http://www.bamn.com/liberator/liberator-5.pdf> (on file with the *Columbia Law Review*) (describing creation and subsequent development of national movement in protest against district court decision in *Grutter*); Students File Motion to Intervene in University of Michigan Law School Lawsuit (Mar. 27, 1998), at <http://bamn.com/news/index.asp?single=44> (on file with the *Columbia Law Review*) [hereinafter Students File Motion].

11. See *infra* Part I.

12. As used here, elites are defined as those with superior status based on social standing, wealth, intellect, or identification with high status institutions, including governmental or political, educational, or commercial institutions. See Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* 25–26 (1995) (defining the elite as “those who control the international flow of money and information, preside over philanthropic foundations and institutions of higher learning, and manage the instruments of cultural production”); C. Wright Mills, *The Power Elite* 3–20 (1956)

ors saw limited success, and my suggestion that law and social movements are in tension helps to account for their failure. The intervenors invoked the rhetoric and employed some of the strategies of the 1960s civil rights movement in defending affirmative action.¹³ They embraced litigation as a tool for achieving change, but they also championed “mass organizing and struggle, . . . mass education and action, . . . [and] democratic . . . decision-making.”¹⁴ The intervenors entered the law school case to offer a perspective they believed to be missing in the diversity-based defense of affirmative action offered by the university and buttressed by amici curiae representing the military, business, academia, and leading professional organizations. These amici made utilitarian arguments in support of the law school’s affirmative action policies.¹⁵ By contrast, the *Grutter* intervenors focused on discrimination and distributive justice.¹⁶

Judging from the structure and rhetoric of the opinions, this public discourse greatly influenced the Court’s analysis. Values, arguments, and narratives evident in the discourse about the Michigan cases found expression in the Court’s description of the benefit of diverse educational environments. Sociopolitical and cultural norms also influenced how the Court analyzed the harm of overwhelmingly white colleges and universities and of admissions systems that give preferential treatment to minorities.¹⁷

At the same time, these decisions suggest that the more moderate (and most elite) elements of the mobilization were the greatest influence

(describing general characteristics of American elite class); Max Weber, *Class, Status, Party*, in *From Max Weber: Essays in Sociology* 180, 180–84 (H. H. Gerth & C. Wright Mills eds. & trans., 1946) (discussing relations between economic power and social power and identifying key factor in status as ownership of property). But as I acknowledge and discuss in Part I, my conception of “elites,” when applied to groups historically disadvantaged by racial status or to organizations that represent these groups, appreciates how racial disadvantage colors socioeconomic status. In other words, when applied to these individuals and groups, the term “elite” must be understood in context, acknowledging that magnitudes of difference can separate well-educated, upper middle-class and upper-class African Americans from well-educated, upper middle-class and upper-class whites. See *infra* text accompanying note 35 (delineating three groups of elites, including establishment, civil rights and civic, and ascendant elites); *infra* notes 163–167, 172–186 and accompanying text (describing how race and resource limitations deflate status of civil rights organizations and of student intervenors who were current and future beneficiaries of affirmative action).

13. See New BAMN Principles, *Liberator*, Sept. 2001, at 14, available at <http://www.bamn.com/liberator/liberator-5.pdf> (on file with the *Columbia Law Review*) (declaring that “BAMN stands proudly in the tradition of the great abolitionist, civil rights, and antiracist movements of the past” and looking to Martin Luther King, Jr. and Malcolm X “as representative leaders of the 1960s”).

14. *Id.* at 13. The students’ perspective was complemented by amicus briefs submitted by civic and civil rights organizations that advanced similar arguments. See *infra* notes 116–124 and accompanying text.

15. See *infra* Part I.

16. See *infra* notes 109–115 and accompanying text.

17. See *infra* Part II.

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on the majority's decision upholding affirmative action in law school admissions.¹⁸ As Justice Thomas noted, the *Grutter* majority justified the constitutionality of affirmative action in terms favored by the "cognoscenti"—the military, business, academic, and professional elites who championed the University of Michigan's race-conscious admissions policies.¹⁹

The *Grutter* majority opinion undoubtedly engaged the centrist arguments of these powerful constituencies, but that is hardly surprising. Given the influence that elite interest groups generally wield in political and legal cultures,²⁰ it was expected. The Court's allusion to the perspectives of these elites was a sensible rhetorical strategy. Justice O'Connor may have concluded that the imprimatur of these powerful groups—especially that of military officers during a time of war—might make the Court's endorsement of affirmative action more palatable to those ambivalent about it.²¹

The attention of the *Grutter* majority was not focused solely on the cognoscenti. The Court heard other voices as well. The Center for Individual Rights (CIR), the public interest litigator that represented the plaintiffs, prevailed in *Gratz*. But its view on a crucial issue also found expression in *Grutter*—a case that it ostensibly lost. The *Grutter* majority tacitly accepted the premise of the CIR's case (shared or undisputed by the law school) that, by virtue of better average performance on the relevant admissions criteria, the plaintiffs were more qualified for—and hence more deserving of admission to—the law school than were the affirmative action admits.²² Hoping to draw attention to the issue of discrimination, the intervenors turned the CIR's argument on its head and asserted that affirmative action was justified as a remedy for the university's reliance on discriminatory admissions criteria. The intervenors,

18. Of the sixty-nine amicus briefs submitted in *Grutter*, the majority cited eight, three of which were business and military briefs, and two of which were university briefs. In addition, the majority cited the brief of the United States. The *Grutter* majority cited the briefs of Judith Areen et al., Amherst College et al., 3M et al., General Motors Corp. et al., Julius W. Becton, Jr. et al., the Association of American Law Schools, the United States, and the American Educational Research Association. For a complete list of amicus briefs submitted in both cases, see Information on U-M Admissions Lawsuits, Mar. 9, 2005, at <http://www.umich.edu/~urel/admissions/legal/amicus.html> (on file with the *Columbia Law Review*) [hereinafter Information on Lawsuits].

19. See *Grutter v. Bollinger*, 539 U.S. 306, 349–51 (2003) (Thomas, J., dissenting).

20. See *infra* Part II.

21. See Evan Caminker, A Glimpse Behind and Beyond *Grutter*, 48 St. Louis U. L.J. 889, 893–94 (2004) (arguing as *Grutter* litigator (and law school dean) that military brief aided Michigan law school's case immensely though it was not directly relevant to law school's admissions process); Joel K. Goldstein, Beyond *Bakke*: *Grutter-Gratz* and the Promise of *Brown*, 48 St. Louis U. L.J. 899, 948–49 (2004) (arguing that military brief influenced Justice O'Connor's rationale and rhetoric). But see William E. Nelson, *Brown v. Board of Education* and the Jurisprudence of Legal Realism, 48 St. Louis U. L.J. 795, 834 (2004) (arguing that reliance on military and business amicus briefs was cynical).

22. See *infra* notes 226–229 and accompanying text.

however, were unsuccessful on this point. The claim of credentials bias was met with silence, even in concurrences by Justices Ginsburg, Souter, Stevens, and Breyer.²³

The fate of the *Grutter* intervenors and their “mass movement” for social justice is my point of entry into the scholarly conversation about the relationship between social movements and law in the courts.²⁴ The reigning view in the legal literature, advanced principally in the work of Professor Bill Eskridge, is that juridical law is and should be a critical player in the creation and evolution of social movements.²⁵ Legal mobilization theorists agree that law and legal discourse can be an especially useful point of reference for social movements.²⁶ In contrast, this Article argues that social movements and juridical law are fundamentally in tension. I turn to nineteenth- and twentieth-century social movement history

23. In a forthcoming essay, I discuss Justice Thomas’s dissenting opinion in *Grutter*, which did engage the intervenors’ arguments, though without explicit reference to them. Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Clarence Thomas?: The Grutter v. Bollinger Opinion*, 7 U. Pa. J. Const. L. (forthcoming Feb. 2005) (manuscript at 13–19, on file with the *Columbia Law Review*).

24. This literature includes Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 Cal L. Rev. 791, 794–802 (2002) (discussing women’s movement’s effect on the law); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2001) [hereinafter Eskridge, *Channeling*] (noting that “social movements literature does not adequately reflect the importance of law” and exploring connection between law and social movements); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2353 (2002) [hereinafter Eskridge, *Identity*] (“[N]o theory of constitutional law can be adequate or successful which does not centrally involve [identity-based social movements] and their jurisprudence.”); Edward L. Rubin, *Passing through the Door: Social Movement Literature and Legal Scholarship*, 150 U. Pa. L. Rev. 1 (2001) (discussing differences between scholarship written by social scientists and by law professors); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. Pa. L. Rev. 297 (2001) [hereinafter Siegel, *Text*] (discussing feminist movement’s effect on equal protection jurisprudence). In addition, some scholars of the labor movement have discussed the relationship between popular action and law. See generally, e.g., William E. Forbath, *Law and the Shaping of the American Labor Movement* (1991); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999); James Gray Pope, *Labor’s Constitution of Freedom*, 106 Yale L.J. 941 (1997). Finally, some of the literature on law and social change is relevant to the question of how law and social movements relate. See sources cited *infra* note 27.

25. See generally Eskridge, *Channeling*, *supra* note 24 (advancing view that judges should moderate over social movements to achieve “peaceable pluralism”). But cf. Siegel, *Text*, *supra* note 24, at 322 (rejecting juricentric interpretations of constitutional law but emphasizing constitutional text as a site for community contestation of constitutional meanings).

26. See, e.g., Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* 48 (1994) [hereinafter McCann, *Rights*] (arguing that equal pay litigation had important symbolic effect on comparable worth movement and made pay scales more equitable to women); Kevin J. McMahon & Michael Paris, *The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism*, in *Leveraging the Law: Using the Courts to Achieve Social Change* 63, 63–82 (David A. Schultz ed., 1998) (arguing that Professor Rosenberg undervalues direct and indirect positive effects of *Brown* on Montgomery bus boycott).

and the social science literature to demonstrate this point. I then argue that in privileging law in analyses of social movements, constitutional theorists and legal mobilization scholars are overlooking an important distinction—namely, the difference between the *definitional* and *inspirational* roles that constitutional law in the courts can play in protest movements. Social movements may profitably use rights talk to inspire political mobilization, although with less success than legal mobilization theorists assume. But social movements that define themselves through law in the courts risk undermining their insurgent role in the political process, thus losing their agenda-setting ability.

Viewed within this framework, the *Grutter* “mass movement” failed to significantly impact the constitutional order. Instead, the intervenors engaged in a single-issue political and legal reform campaign, with limited success. Their limited success demonstrates the tension between litigation and social movement tactics.

Like skeptics of litigation as a tool of social change,²⁷ I aim to decenter constitutional law as the beginning point for scholarly discussions of how change occurs, as social movement theory contemplates. At the same time, the *Grutter/Gratz* paradigm provides an inquiry about the efficacy of law that is more discrete than other scholars have undertaken. The most significant works on the connection between law and social change have painted on a large canvas; this scholarship makes broad claims about how law impacts society based on examinations of lines of cases traversing many status groups and subject areas, from abortion to the death penalty to school desegregation and equal pay litigation.²⁸ The *Grutter* and *Gratz* litigation represents a smaller canvas. Still, *Grutter* and *Gratz* are a fitting microcosm in which to study the relationship between law and movements seeking social change because of the importance of the cases in recent constitutional history,²⁹ and the widespread public

27. See Michael J. Klarman, *From Jim Crow to Civil Rights* 468 (2004) [hereinafter Klarman, *Jim Crow*] (concluding that Supreme Court decisions from *Plessy* to *Brown* alone did not fundamentally alter race relations because of political and social constraints on justices and force of extralegal events); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) (asking, in the context of civil rights, women’s rights, and the environment, “whether, and under what conditions, courts can produce significant social reform” and concluding that fundamental change through law rarely occurs); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* 5 (1974) (arguing that reformists’ litigation campaigns undermine effective challenges to stratification by fostering a “myth of rights”); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. Am. Hist. 81 (1994) [hereinafter Klarman, *Backlash*] (arguing that *Brown* indirectly influenced course of civil rights movement by inciting violent white southern repression of black activists, which in turn engendered support for civil rights legislation among northern whites, and ultimately led to Civil Rights Act of 1964 and Voting Rights Act of 1965).

28. See sources cited *supra* note 27.

29. Constitutional scholars and commentators have touted the Michigan decisions as landmarks in constitutional history, commonly equating the cases with *Brown* in importance. See, e.g., Michelle Adams, *Grutter v. Bollinger: This Generation’s Brown v.*

debate that they generated, coupled with the large scale of the intervenors' ambition and the impressive scope and duration of their efforts to defeat the rollback of affirmative action. The size of the intervenors' ambition was indicated by their stated goal of initiating a new civil rights movement and preserving the gains of the mid-twentieth-century movement for formal racial equality. The scope and duration of the intervenors' efforts in *Grutter* were larger than that particular case itself. Their actions in the Michigan cases were preceded by sustained pro-affirmative action activism in multiple states over several years.³⁰ Hence, it would be a mistake to discount the importance of the intervenors' putative social movement.³¹ The intervenors' effort to begin a new civil rights movement and preserve affirmative action provides a rich context for assessing the challenges that social movements confront. It is a fitting context for answering the call from Professor Reva Siegel for a "thicker description of the understandings and practices through which mobilized groups of Americans regularly endeavor to shape the Constitution's meaning."³²

My discussion of how law mediates democracy in the Michigan affirmative action decisions proceeds in three parts. Part I illuminates the constitutional culture in which *Grutter* and *Gratz* were decided by identifying the major categories of citizen mobilization around the decisions and

Board of Education?, 35 U. Tol. L. Rev. 755, 756 (2004) ("*Grutter* is this generation's *Brown*, presenting a 'solution' to the terribly difficult and divisive racial question of our time."); Jack M. Balkin, What *Brown* Teaches Us About Constitutional Theory, 90 Va. L. Rev. 1537, 1567 (2004) (suggesting that "in *Grutter v. Bollinger*, the anticlassification principle of *Brown* is consistent with race-conscious affirmative action programs that promote diversity by ensuring a critical mass of minorities"); Leonard M. Baynes, From *Brown* to *Grutter*: Methods to Achieve Non-Discrimination and Comparable Racial Equality, 80 Notre Dame L. Rev. 243, 243 (2004) (describing *Brown* and *Grutter* as "ground-breaking cases [which] heralded American racial justice and diversity"); Harry T. Edwards, The Journey from *Brown v. Board of Education* to *Grutter v. Bollinger*: From Racial Assimilation to Diversity, 102 Mich. L. Rev. 944, 947 (2004) ("*Brown* and *Grutter* are landmarks in the evolution of race relations in the United States.>").

30. See *infra* Part I.C.2.

31. The other monumental constitutional case from the Supreme Court's 2003 term, *Lawrence v. Texas*, 539 U.S. 558 (2002), the decision striking down a Texas statute criminalizing same-sex sodomy, has been analyzed from sociopolitical and cultural perspectives as well. For recent legal commentary on the case and the sociopolitical environment in which it was decided, see Bernard E. Harcourt, Foreword: "You Are Entering a Gay and Lesbian-Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About *Lawrence*, Sex Wars, and the Criminal Law], 94 J. Crim. L. & Criminology 503, 505 (2004) (discussing law, politics, and cultural norms surrounding gay marriage decision); Darren Lenard Hutchinson, The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics, 23 Law & Ineq. 1 (2005) (discussing gay rights and affirmative action decisions and debate over judicial review and considering civil rights activists' reactions to decisions from social movement perspective); Christopher R. Leslie, *Lawrence v. Texas* as the Perfect Storm, 38 U.C. Davis L. Rev. 509 (2005) (discussing history and implications of *Lawrence*).

32. Siegel, Text, *supra* note 24, at 304; see also McMahon & Paris, *supra* note 26, at 63-64 (calling for "thick 'conflict and policy narratives'" aimed at exploring how lawyers and communities seek to mobilize law to affect change).

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describing each group's narratives about equality. This Part concludes by observing that the identities of the most prominent voices in the public mobilization around *Grutter* and *Gratz*—and the prominence of the affirmative action debate itself in public discourse about social justice—lend support to the elitist model of institutionalized politics.

Part II analyzes the relationship between the mobilization identified in Part I and the outcomes in *Grutter* and *Gratz*. This Part's analysis demonstrates how, despite the Court's attempt to respond to each of the groups described in Part I, the majority's rhetoric reflects deference to the arguments of the law school and the more moderate and elite elements among its supporters. By contrast, the Justices who backed affirmative action were unresponsive to the most radical dimension of the *Grutter* intervenors' defense of affirmative action—that the law school's race-conscious policies remedied its reliance on racially discriminatory admissions criteria. Thus, paradoxically, the intervenors won their case, but did so in a way that confirmed their relative lack of influence in the legal and political processes.³³

Part III situates the discussion of the *Grutter* intervention within the legal, social science, and historical literature on race-related social movements. The mid-twentieth-century civil rights movement—a progressive, social justice-oriented movement—provides the primary analytical paradigm. The central insight is that elite-dominated interest group litigation and progressive social movements aimed at accomplishing fundamental change are distinct and largely incompatible phenomena. As a result, in most instances, juridical law should play a secondary role in social movements seeking fundamental change; mass movements must lay the groundwork for constitutional litigation. Those seeking social justice should first mobilize outside the law before attempting to change society through law in the courts.

I. VOICES

The Michigan affirmative action cases featured sustained efforts by many different sectors of society to influence the outcome of the litigation. The public mobilization was tremendous in scope. It involved thousands of individuals, groups, and institutions and featured a flood of amicus curiae briefs³⁴ and intervenors claiming to be a social movement

33. See, e.g., E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* 35 (1960) ("The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system."); see also *infra* notes 143–149 and accompanying text.

34. In this respect, *Grutter* and *Gratz* recalled the public's interest in *Roe v. Wade*, which also generated scores of amicus briefs. See Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 *St. Louis U. L.J.* 773, 775 n.9 (2003) (arguing that even if Justices O'Connor and Kennedy were not concerned about reaction in Congress if they joined majority opinion overruling *Roe*, it is possible that they also both viewed Congress as

for racial justice. This Part identifies the major elite citizen groupings central to my thoughts about elite participation and agenda setting in the *Grutter* and *Gratz* litigation. I first consider the positions of the major affirmative action opponent, the public interest group that filed suit against Michigan and the United States government. I then focus on the positions of the University of Michigan and other affirmative action proponents, specifically the military, business, professional, and academic amici curiae (the “establishment elite”); the student intervenors (the “ascendant elites”); and amici curiae associated with organizations that traditionally have supported black advancement (the “civil rights and civic elites”).³⁵ In addition, I note the profusion of public opinion polls on affirmative action that were a significant element of the political environment in which *Grutter* and *Gratz* were decided. I develop this taxonomy of voices with a view toward identifying the rhetoric and values about race, equal protection, and education that animated these cases. These elements, together with relevant legal precedents, processes, and norms, formed the constitutional culture in which the Supreme Court reached its decisions in the affirmative action cases. This discussion lays the groundwork for Part II’s observation that the *Grutter* and *Gratz* decisions are informed primarily by the preferences and values of the highest-status segment of the public mobilization around the affirmative action cases—and the groups with the greatest influence in institutionalized politics—rather than the intervenors and other more fledgling voices.

A. *The Opponents of Affirmative Action*

1. *The Catalyst.* — The central agenda setter in the *Grutter* and *Gratz* litigation was the CIR, an organization that litigates public interest cases.³⁶ The CIR, seeking to advance the value of absolute colorblindness under the law, is one of the most successful conservative public interest group litigators in recent years.³⁷ Its conception of equal protection rec-

a “barometer of public and elite opinion—so that a decision overturning *Roe* would isolate them from communities that they did care about”); see also Neal Devins, Explaining *Grutter v. Bollinger*, 152 U. Pa. L. Rev. 347, 370 (2003) [hereinafter Devins, Explaining *Grutter*] (noting stark contrast between *Grutter*, where there was an absence of especially powerful voices against the university’s policy, and other highly charged political controversies to reach the Court, such as abortion and religion in schools).

35. For a discussion of why I have delineated these groups in this manner, see *infra* Part I.C.

36. See David Segal, Putting Affirmative Action on Trial: D.C. Public Interest Law Firm Scores Victories in War on Preferences, Wash. Post, Feb. 20, 1998, at A1 (profiling CIR and describing some of its cases).

37. CIR makes clear its view on race jurisprudence on its website:

CIR’s civil rights litigation is based on the principle of strict state neutrality: the state must not advantage some or disadvantage others because of their race.

Race, like religion, must be placed beyond the reach of the state. Our objections to racial preferences are legal, moral, and pragmatic. Preferences are almost always unconstitutional when used to achieve an arbitrary racial diversity; they are only legal when narrowly tailored to remedy past discrimination against

ognizes no distinctions between whites—whether as individuals or as a group—and the racial minorities who benefit from affirmative action policies. Ironically, the CIR has followed the blueprint for attaining formal, colorblind racial equality that was created by the liberal interest group litigators that came before it, in particular the NAACP Legal Defense Fund (LDF),³⁸ which litigated *Brown v. Board of Education*.³⁹

The CIR is the leading contemporary advocate of the “reverse racism” cases that were first filed in large numbers during the 1970s.⁴⁰ The CIR has developed a multipronged strategy for achieving its agenda of outlawing all race-conscious programs designed to benefit racial minorities.⁴¹ The CIR’s program includes using the media to convince the public that race-sensitive policies are antidemocratic quota schemes that systematically disadvantage white men,⁴² lobbying legislative bodies to enact

identifiable individuals. As a moral matter, preferences are dehumanizing and reduce individuals to the color of their skin. And pragmatically, racial preferences almost always add to division and discord in society.

Ctr. for Individual Rights, A Commitment to Protecting Civil Rights, at http://www.cir-usa.org/civil_rights_theme.html (last visited Feb. 9, 2005) (on file with the *Columbia Law Review*). For critiques of colorblindness as a conceptual framework for analyzing equal protection, see, for example, Lani Guinier & Gerald Torres, The Miner’s Canary 32–66 (2002); Neil Gotanda, A Critique of “Our Constitution is Colorblind,” in *Critical Race Theory* 257, 268–74 (Kimberlé Crenshaw et al. eds., 1995); Reva B. Siegel, Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification, 88 Cal. L. Rev. 77, 87–93 (2000).

38. See Lee Epstein, Conservatives in Court 94, 113, 120 (1994) (describing conservative interest group litigators borrowing LDF’s strategies and tactics); Mark V. Tushnet, The NAACP’s Legal Strategy Against Segregated Education, 1925–1950, at 1–33, 105–37 (1987) (describing LDF’s litigation campaign). Like LDF, the CIR relies on test cases in specific localities to vindicate its agenda of ending—categorically—affirmative action policies benefiting racial minorities. See, e.g., Caminker, *supra* note 21, at 891 (discussing CIR’s strategy in affirmative action litigation). Like LDF, the CIR makes deliberate choices about who will serve as plaintiffs in the test cases that it chooses to bring. Greg Stohr, A Black and White Case: How Affirmative Action Survived Its Greatest Legal Challenge 46–49 (2004) (discussing CIR’s process of choosing plaintiffs). These similarities are intriguing and raise the question of precisely what is the CIR’s relationship to the public and whether it would be appropriate or useful to study this group from a social movement perspective. An extended analysis of this sort is, however, beyond the scope of this Article.

39. 347 U.S. 483 (1954).

40. See Epstein, *supra* note 38, at 80–146 (describing litigation campaigns against obscenity, abortion, and social welfare programs for the poor by conservative interest groups). Examples of earlier “reverse racism” cases, include, of course, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (involving suit by white male challenging medical school’s admissions policy as discriminatory); see also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (involving challenge by white employees to policy favoring blacks in layoff determinations rather than exclusively considering seniority).

41. See Stohr, *supra* note 38, at 25–30 (describing history and early successes of CIR).

42. See, e.g., Michael S. Greve, A River Runs Dry, *Pol’y Rev.*, Apr. & May 1999, at 77, 77–82 (reviewing William G. Bowen & Derek Bok, *The Shape of the River* (1998)) (claiming, among other things, that the book is out of touch with views of American public, judiciary, and legislators); Terence J. Pell, Texas Must Choose Between a Court

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anti-affirmative action legislation, locating sympathetic plaintiffs, and, ultimately, filing and prosecuting lawsuits challenging race-conscious policies.⁴³ The CIR has pursued its agenda with great success in recent years, leading anti-affirmative action efforts in California, Washington, and Texas.⁴⁴ These efforts laid the groundwork for the CIR's activism in Michigan.

The plaintiffs the CIR chose for the *Grutter* and *Gratz* litigation powerfully embodied the white victimization narrative that the organization advances in its campaigns against affirmative action.⁴⁵ Selected from among some two hundred interested students, the three plaintiffs—all hailing from suburbs of Detroit and from working-class or lower middle-class backgrounds⁴⁶—personified the idea that meritorious white students from “middle America” were being victimized by racial quotas that advantaged minorities in university admissions. The named plaintiffs included Jennifer Gratz, daughter of a suburban Detroit police sergeant and a hospital lab worker. Gratz “came from a distinctly working-class neighborhood,” and “planned to be the first member of her family to

Order and a Clinton Edict, Wall St. J., Apr. 2, 1997, at A15 (arguing that Office of Civil Rights under Clinton administration was encouraged to go against federal law by implementing policies that encouraged continued use of race as a factor in university admissions).

43. See Terry Carter, On a Roll(back), A.B.A. J., Feb. 1988, at 54, 55 (describing CIR lawsuits); Idris M. Diaz, Mischief Makers: The Men Behind All Those Anti-Affirmative Action Lawsuits, Black Issues in Higher Educ., Dec. 25, 1997, at 14, 15 (same); David Jackson, Conservative Firm at Center of Civil-Rights Debate, Dallas Morning News, Nov. 2, 1997, at 1J, LEXIS, News & Business, By Individual Publication; W. John Moore, A Little Group Makes Big Law, Nat'l L. J., Nov. 15, 1997, at 2323 (describing CIR's past legal successes); Peggy Walsh-Sarnecki, The Men Who Would End Affirmative Action, Detroit Free Press, Aug. 25, 1998, at 1A (profiling CIR).

44. See, e.g., *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194–95 (9th Cir. 2000) (dismissing for mootness claims of three law students alleging the school impermissibly used race as an admissions criteria in violation of Title VI and Equal Protection Clause); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 710–11 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997) (upholding constitutionality of California Civil Rights Initiative, “Prop. 209,” which prohibited discrimination on basis of race and sex). Some scholars have criticized interest groups’ use of the initiative and referendum process as having the paradoxical effect of undermining ordinary people’s influence on public policy and inscribing the preferences of wealthy interest groups into law. See generally Elizabeth Garrett, Democracy in the Wake of the California Recall, 153 U. Pa. L. Rev. 239 (2004) (describing influence of money and interest groups on initiative and referendum processes and relative lack of influence of grassroots groups); Peter Schrag, Take the Initiative, Please: Referendum Madness in California, Am. Prospect, Sept.–Oct. 1996, at 61 (explaining how the initiative has “become the principal driver of policy in California, sometimes for the good, but more often not” and arguing that impact of past twenty years’ initiatives has been “to strip cities, school districts, and especially counties of their ability to generate their own funds; to divide authority and responsibility uncertainly between state and local government and among scores of agencies; and to make it increasingly unclear who is ultimately accountable for the results of all these changes”).

45. See Stohr, *supra* note 38, at 47–49 (describing characteristics and backgrounds of *Grutter* and *Gratz* plaintiffs).

46. *Id.* at 1–3, 47–49.

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graduate from college.”⁴⁷ The second plaintiff was Patrick Hamacher, a hospice volunteer, varsity football and baseball player, and member of the school choir; he also worked several part-time jobs to support himself.⁴⁸ Barbara Grutter, a 43-year-old single mother who ran a healthcare consulting business from her home in a working-class suburb of Detroit, was the plaintiff in the law school case.⁴⁹ These students, all from humble backgrounds, were well suited to be the public face of the CIR’s claims that affirmative action hurts the average white student.

In constructing this narrative, the CIR invoked the argument that LDF attorney Robert Carter had presented to the Supreme Court in *Brown*.⁵⁰ The CIR litigators argued that the outcome in the law school affirmative action case would demonstrate whether “the Dred Scott case or the Fourteenth Amendment embodies our national principles, whether Plessy versus Ferguson, or Brown versus the Board of Education, is the law of the land.”⁵¹ The CIR’s summoning of Carter’s opening statement and references to *Dred Scott* and *Plessy* poignantly dramatized its contention that affirmative action is immoral and constitutes an enormous injustice to whites, one just as pernicious as Jim Crow was to blacks.

2. *The United States*. — The Bush Administration opposed Michigan’s race-conscious admissions policies in both the law school and undergraduate cases. In an amicus curiae brief, the Solicitor General argued that the Equal Protection Clause requires colorblindness and that public institutions may only resort to race-based policies when “necessary.”⁵² Race-based policies such as those used by the University of Michigan were “unfair” and imposed “unnecessary burdens on innocent third parties.”⁵³ These inequities were avoidable, the government argued, because diversity can be achieved in higher education through race-neutral means.⁵⁴

47. Id. at 1–2.

48. Id. at 49.

49. See id. at 47–48; Michael Betzold, University of Michigan Defends Race-Based Admissions, Chi. Trib., Dec. 11, 1997, at 1; Carol Morello, A New Battleground for Affirmative Action, USA Today, Nov. 28, 1997, at 10A.

50. See, e.g., Brief for Petitioner at 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (“We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the [E]qual [P]rotection [C]ause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” (quoting opening argument of Robert L. Carter, attorney for petitioners in *Brown v. Board of Education*, 347 U.S. 483 (1954), in 49 Landmark Briefs and Arguments of the Supreme Court 281 (Philip B. Kurland & Gerhard Casper eds., 1975))).

51. Record of Feb. 16, 2001, at 31, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928).

52. Brief of United States as Amicus Curiae at 9–14, *Grutter* (No. 02-241) [hereinafter United States Brief, *Grutter*].

53. Id. at 12; see also *Gratz v. Bollinger*, 539 U.S. 244, 253–57 (2003) (discussing treatments of minority and nonminority students under Michigan’s race-conscious undergraduate admissions policies).

54. United States Brief, *Grutter*, supra note 52, at 9–13; see also *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting) (criticizing use of such “race neutral” means such as

The Solicitor General touted facially neutral “percentage plans,” which would guarantee admission to high school students who graduate in the top quartiles of their classes, as an alternative to openly race-sensitive policies.⁵⁵ He noted that percentage plans had been used successfully in Texas, Florida, and California, states where race-conscious policies were outlawed; according to official state reports, universities in those states had replicated or surpassed the diversity levels achieved through race-conscious policies.⁵⁶ In light of this track record, the United States argued, there was no reason to believe that selective institutions such as the University of Michigan could not admit a diverse student body without relying on “disguised quotas.”⁵⁷ Whereas the government embraced an egalitarian vision of higher education, the university either did not or was not willing to use a system that, on its face, was fairer than its race-conscious alternative. The government’s brief, however, did not respond to critics’ claim that percentage plans were not genuinely race-neutral and instead were premised on the reality that most secondary schools were racially segregated.⁵⁸ In other words, the government ignored the criticism that its understanding of proscribed race consciousness was limited to facial or explicit discrimination. As a consequence, the Administration simultaneously championed the norm of colorblindness, promoted the idea that the current structure of higher education is consistent with egalitarianism, and affirmed its support for the concept of diversity in higher education.

B. *Public Opinion: The Ambivalent Center*

Public opinion, as measured in numerous opinion polls,⁵⁹ was also a prominent element of the political environment in which the Michigan

percentage plans as “disingenuous” because they “depend for their effectiveness on continued racial segregation at the secondary school level”).

55. Brief of United States as Amicus Curiae at 16–17, *Gratz* (No. 02-516).

56. United States Brief, *Grutter*, supra note 52, at 17–22.

57. *Id.* at 9, 13–18, 22–25.

58. Critics point out that percentage plans are predicated on de facto segregation in high schools, and their intent is the same as avowedly race-sensitive programs like Michigan’s. See, e.g., Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 *Harv. C.R.-C.L. L. Rev.* 245, 277 (1999) (noting small number of minority students currently eligible for admission to state universities under state’s percentage plan); Catherine L. Horn & Stella M. Flores, *The Civil Rights Project, Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences* 59–60 (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf> (on file with the *Columbia Law Review*) (examining percentage plans and concluding that they are ineffective proxies for racial inclusiveness at elite colleges); see also Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 *N.Y.U. L. Rev.* 1, 18–22 (1997) (providing empirical support for view that affirmative action is necessary in maintaining diverse yet capable law schools).

59. Poll data is not necessarily a reliable indicator of actual preferences, especially as they relate to race. See Deborah W. Denno, *The Perils of Public Opinion*, 28 *Hofstra L. Rev.* 741, 762 (2000) (arguing that because of extremely high refusal rates and because

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cases were decided. Together with numerous media outlets, both conservative and liberal interest groups commissioned polls, the results of which were publicized at pivotal points leading up to the *Grutter* and *Gratz* arguments in the Supreme Court. The polls, conducted by Gallup, the Harvard Graduate School of Education, CNN, and CBS/New York Times, demonstrated the American public's *qualified* support for affirmative action. The polls showed that a majority of Americans, ranging from fifty-three percent to sixty-six percent, view affirmative action as a social good; fewer than twenty percent, however, support race-conscious numerical set-asides in hiring or admissions when pollsters characterize beneficiaries of such preferences as less credentialed than other applicants.⁶⁰

Given these ambiguities in the poll results, both proponents and opponents of affirmative action deployed the data to support their respective positions. The overarching significance of the polls, however, was their indication that a majority of Americans apparently can reconcile at least some forms of affirmative action with their values.⁶¹ But these polls also suggest that the populace's support for affirmative action is tenuous. The polls indicate that a majority of Americans simultaneously embrace the norm of colorblindness, the concept of equal opportunity, and the view that merit explains the position of an individual in the socioeconomic hierarchy.⁶² As a result, the public is ambivalent about the constitutionality of status-conscious affirmative action policies. Affirmative action policies test the public's perhaps paradoxical allegiance to

"[i]ncreasingly, public opinion polls fail to reflect the kinds of diverse demographics that should constitute the 'community consensus,'" validity of current opinion polling data is doubtful).

60. See Press Release, Harvard Graduate School of Education, National Poll Shows Strong Public Support for Affirmative Action, Diversity on College and University Campuses (May 17, 2001), available at <http://www.gse.harvard.edu/news/features/orfield05172001.html> (on file with the *Columbia Law Review*) (citing poll results showing that sixty-four percent of Americans support "overall affirmative action for women and minorities" and sixty-six percent think college admissions criteria "should include students' entire backgrounds as well as their tests and grades"); Associated Press, Poll: Races Split on Achieving School Diversity, Mar. 10, 2003, at <http://www.cnn.com/2003/EDUCATION/03/10/affirmative.action.ap/> (on file with the *Columbia Law Review*) (including results of AP poll showing that fifty-one percent of Americans overall and eighty-nine percent of black Americans believe affirmative action is still necessary); CBS News/New York Times, Poll: Affirmative Action (Jan. 19–23, 2003), at http://www.cbsnews.com/htdocs/CBSNews_polls/affirm_back.pdf (reporting that fifty-three percent of Americans favor affirmative action programs); David W. Moore, Public: Only Merit Should Count in College Admissions: Little Perception of Racial Bias in Application Process, The Gallup Organization, June 24, 2003, at <http://www.gallup.com/poll/content/?ci=8689> (on file with the *Columbia Law Review*) [hereinafter Moore, Merit] (citing poll results showing that forty-nine percent of all adults favor affirmative action programs for racial minorities, but sixty-nine percent thought college applicants should be considered solely on merit (see answers to questions 1, 2, 5, 6, 7, 9, 11, 13c, 14c)).

61. See Michael Klarman, Are Landmark Court Decisions All That Important?, *Chron. Higher Educ.*, Aug. 8, 2003, at B10 [hereinafter Klarman, Decisions] (noting that *Grutter* majority seems to be in sync with public opinion).

62. See polls cited *supra* notes 59–60.

colorblindness, equal opportunity, and merit, as race-conscious policies are predicated on the assumption that these three values are irreconcilable at present.⁶³ According to affirmative action supporters, absolute colorblindness is at odds with the imperative of equal opportunity in light of the fact that many minorities fare less well than whites on the criteria used to measure merit in education and employment.⁶⁴

C. Affirmative Action Proponents

1. *The University of Michigan*. — The defendant's arguments in support of its affirmative action policies steered clear of the value-laden arguments that animate the public's ambivalence over affirmative action. Instead, the university's defense of both the undergraduate and law school policies focused on narrow doctrinal questions. Its counsel argued that the principle of stare decisis commanded that the Court reaffirm *Regents of the University of California v. Bakke*, where a plurality of the Court upheld the constitutionality of admissions policies designed to achieve diverse learning environments.⁶⁵ The university and law school then argued that the policies that they used to achieve diversity were narrowly tailored.⁶⁶ That is, Michigan's policies were of the competitive, race-plus variety that Justice Powell endorsed in *Bakke*,⁶⁷ rather than noncompetitive racial quotas,⁶⁸ which unquestionably are unconstitutional.

63. For a recent discussion of how notions of merit figure into resistance to race-conscious policies, see Pauline T. Kim, *The Colorblind Lottery*, 72 *Fordham L. Rev.* 9, 17–21 (2003).

64. On the racial implications of prevailing measures of merit, see Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 *Tul. L. Rev.* 1843, 1856–57 (2004) (documenting performance gap between black and white students throughout grade levels and on standardized tests); Guinier, *Admissions Rituals*, *supra* note 5, at 133–35; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 *Cal. L. Rev.* 953, 993–97 (1996) (arguing that “existing meritocracy excludes people based on their race, gender, and class status” and that “conventional meritocracy disproportionately includes people who are wealthy, male, and white” and “creates a modern-day aristocracy that gives further advantages to the already advantaged, and creates barriers for those who are not”).

65. See Brief for Respondents at 14–21, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Respondents' Brief, *Grutter*]; Brief for Respondents at 13–21, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter Respondents' Brief, *Gratz*]; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (“[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”); *id.* at 314 (“[T]he interest of diversity is compelling in the context of a university's admissions program.”).

66. See Respondents' Brief, *Grutter*, *supra* note 65, at 33–50; Respondents' Brief, *Gratz*, *supra* note 65, at 32–41.

67. 438 U.S. at 318 (finding lawful Harvard's use of race as one of many factors in admissions decisions).

68. *Id.* at 272–75, 319–20 (finding unlawful a program that both set aside sixteen of one hundred seats in each year's entering class for minorities and funneled minorities through separate admissions process).

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The university disavowed any remedial justification for its affirmative action programs.⁶⁹ It did argue, however, that affirmative action in higher education counteracts racial stereotypes that are in part a consequence of residential segregation and social separation.⁷⁰ In light of continuing race-based discrimination, counsel for the University of Michigan Law School wrote that “law schools need the autonomy and discretion to decide that teaching about . . . race . . . [is a] critically important aspect[] of their institutional missions.”⁷¹ As framed by the university, the main justification for affirmative action was utilitarian. The development of interpersonal intelligence about race was crucial for law students because law schools train future leaders who must “learn how to bridge racial divides, work sensitively and effectively with people of different races, and . . . overcome the initial discomfort of interacting with people visibly different from themselves that is a hallmark of human nature.”⁷² Lee Bollinger, then president of the university, expressed these same sentiments

69. Bollinger reportedly believed that *Brown* needed to be the starting point for the public debate and questioned whether *Bakke*'s diversity rationale was a “powerful enough” argument. Stohr, *supra* note 38, at 73. But the university did not in fact emphasize this rationale in its presentations, notwithstanding the occasional reference (such as in Bollinger's testimony). Practically speaking, emphasizing remedial considerations probably was considered adverse to the university's interests. Theoretically, however, nothing prevented the university from offering a combined diversity and remedial justification for its race-sensitive admissions policies. Together, the two rationales might have offered a more compelling justification for affirmative action than either standing alone. After all, many commentators view past and present discrimination as the true explanation for universities' commitment to racially diverse student bodies. See Lawrence, *supra* note 5, at 931 (arguing “radical substantive defenses” of affirmative action include “the need to remedy past discrimination [and to] address present discriminatory practices”); Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 472 (1997) (“[T]he true, core objective of race-based affirmative action is nothing other than helping blacks.”). *Bakke* would not have precluded a two-pronged argument since it contains language that endorses the discrimination-focused corrective rationale for affirmative action; in any event, *Bakke* does not proscribe a remedial justification for race-sensitive admissions. See Goldstein, *supra* note 21, at 940–41 (describing rationale of *Bakke* decision). On the relative merits of remedial versus diversity rationales for affirmative action, see Kenneth L. Karst, The Revival of Forward-Looking Affirmative Action, 104 Colum. L. Rev. 60, 61–65 (2004) (detailing Court's approach to this debate); Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78, 94 (1986) (providing arguments on both sides).

70. See Respondents' Brief, *Grutter*, *supra* note 65, at 23 (noting that “America remains . . . highly segregated by race” and the “unfortunate persistence of widespread racial discrimination” and arguing that the presence of students who have experienced discrimination “enriches the educational environment”); Respondents' Brief, *Gratz*, *supra* note 65, at 25 (noting that “continuing patterns of residential segregation” mean that “most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity” and arguing that universities should not “ignore the world in which they are educating their students to live and lead”).

71. See Respondents' Brief, *Grutter*, *supra* note 65, at 25.

72. *Id.*

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at trial.⁷³ The university did not discuss the riposte made by some, including Justice Clarence Thomas, that affirmative action stigmatizes its “beneficiaries” and therefore is not a benign form of discrimination, whatever its pedagogical benefits.⁷⁴

Nor did the defendants address the contention of some affirmative action proponents that race consciousness in admissions is necessary to remedy the use by the college and law school of racially discriminatory admissions criteria.⁷⁵ Instead of confronting that issue directly, Michigan argued, elliptically, that it should not have to abandon “selectivity” as a “core part” of its mission in its quest to achieve racially diverse learning environments.⁷⁶ The university’s claim that diversity and selectivity are mutually exclusive rested on its assertion that the pool of black and Hispanic applicants who meet Michigan’s selective admissions criteria is small. Since white applicants far outnumber minority applicants and tend on average to have higher scores, many more whites will be admitted to the institution than minorities in the normal (race-neutral) scheme of things. Hence, the university argued, it can only admit a “critical mass” of minority students by taking account of applicants’ race.⁷⁷

Michigan’s contention about the limited pool of minority applicants raises as many questions from critics as it answers. In an unlikely convergence of viewpoints, both Justice Thomas and the intervenors identified credentials bias as the true source of Michigan’s pool “problem.”⁷⁸ From the university’s standpoint, however, this conundrum likely seemed beside the point. Diversity in law schools promotes tolerance and professionalism; thus, the law school is obligated to assemble diverse student bodies. It does so by relying on measures of ability that are almost universally used in its “market” and that enable admissions offices to efficiently screen large volumes of applications. The relevant constitutional ques-

73. See Record of Jan. 18, 2001, at 58, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928) (“Given the history of this country, given the history of race relations in the United States and indeed in the world, . . . [race] is simply a part of life. . . . [R]acial and ethnic diversity are as critical to that process as any other way in which we try to compose a class . . .”).

74. See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (“The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.”).

75. See *infra* notes 109–115 and accompanying text.

76. Respondents’ Brief, *Grutter*, *supra* note 65, at 35–36; see also *id.* at 19–20 (“Overruling *Bakke* would force this Nation’s elite and selective institutions of higher education, public and private, to an immediate choice between dramatic resegregation and abandoning academic selectivity.”).

77. See *id.* at 36 (“There are so many more white and Asian American applicants throughout the upper and middle score ranges that no incremental lowering of standards will create a pool with meaningful racial diversity.”); Respondents’ Brief, *Gratz*, *supra* note 65, at 42–43, 46–49 (“Michigan is overwhelmingly white. . . . Thus, even were it otherwise feasible for the University to implement some sort of high school-based percentage plan without fundamentally altering its very identity—which it plainly is not—the effects on diversity would be disastrous, particularly with regard to Hispanic students.”).

78. See *infra* notes 109–115, 200 and accompanying text.

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tion was whether the law school could exercise its prerogative to assemble its class in a way that achieved its goal of a diverse learning environment without resorting to quotas. This was a narrow question; it did not require discussion of whether the university should retool its admissions criteria. For Michigan, that some minorities find its race-conscious criteria stigmatizing and that some whites not admitted to the law school feel mistreated is unfortunate, but is superfluous to the law.

2. *The Coalition of Amici Curiae and Intervenors.* — The coalition that assembled in support of the University of Michigan used justificatory rhetoric common to both the diversity and remedial rationales for affirmative action policies.⁷⁹ For this reason, these proponents are best understood as consisting of two distinct strands: a distributive justice strand and a utilitarian strand. The distributive justice strand of the coalition itself consisted of two elements. The first was composed of student intervenors; the second consisted of prominent civil rights and civic organizations. These groups filed amicus briefs that reiterated, in large part, the student intervenors' claims.⁸⁰ The utilitarian strand of the mobilization included elite educational institutions, businesses, professional organizations, and a cadre of highly influential individuals, including, most significantly, a group of retired military officers.⁸¹ This group of "establishment" elites also filed amicus briefs in support of Michigan.

The two strands of the mobilization made distinct arguments in support of affirmative action.⁸² Nevertheless, together they created a formidable coalition supporting the university's admissions policies. The coalition's pro-affirmative action offensive went unmatched by those opposed to race-conscious admissions, despite the efforts of the CIR to marshal the public's support for the plaintiffs' arguments.⁸³

a. *The Distributive Justice Strand of the Coalition.* — The distributive justice strand of the coalition advanced moral claims premised on the philosophy of distributive justice.⁸⁴ Discrimination has produced a socioeco-

79. This Article focuses on the contributions of particular friends of the Court; it does not discuss in detail the arguments of every group that submitted an amicus brief in *Grutter* or *Gratz*.

80. See *infra* notes 116–124 and accompanying text.

81. See *infra* notes 125–142 and accompanying text. On interest groups and interest group litigators, see Epstein, *supra* note 38, at 3–14.

82. See *infra* notes 116–142 and accompanying text.

83. See Will Potter, Thousands Rally for Affirmative Action Outside Supreme Court, *Chron. Higher Educ.*, Apr. 11, 2003, at A32 (noting only two counter protestors at rally of thousands in support of affirmative action on day of arguments in Michigan cases); see also Devins, Explaining *Grutter*, *supra* note 34, at 370 (“[W]hen compared to other controversial social issues, the absence of important, powerful voices on one side of the issue seems especially stark.”); Edward W. Lempinen, Prop. 209 Takes National Stage: Uncertain Receptions Await Anti-Affirmative Action Drives, *S.F. Chron.*, Dec. 16, 1996, at A1 (noting that California initiative attacking racial preferences had galvanized affirmative action supporters).

84. On distributive justice, see John Rawls, *A Theory of Justice* 60–63 (1971) (describing justice as fairness and opportunity for all); Owen M. Fiss, Groups and the

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conomic hierarchy and political environment in which minorities, and particularly African Americans, do not receive their just deserts.⁸⁵ Affirmative action ameliorates this imbalance by redistributing to the disadvantaged educational and employment opportunities, as well as the status and political power attendant to those with greater income and wealth.⁸⁶ Such redistribution is consistent with social justice, the theory holds.

A backward-looking component was embedded in these groups' distributive arguments.⁸⁷ Many made remedial arguments premised on the historical discrimination experienced by the families and communities from which many affirmative action beneficiaries hail. From this perspective, the harms perpetrated against African Americans (the paradigmatic victim group) by historic discrimination continue to be visited upon

Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 147–70 (1976) (describing “group-disadvantaging” theory of equal protection, which sanctions race-conscious measures as remedy for past discrimination and its present effects).

85. See, e.g., Brief of Respondents Kimberly James et al. at 33–37, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Kimberly James Brief, *Grutter*]; Brief of American Federation of Labor & Congress of Industrial Organizations as Amici Curiae in Support of Respondents at 5–17, *Grutter* (No. 02-241) [hereinafter AFL-CIO Brief, *Grutter*]; Brief of Coalition for Economic Equity et al. as Amici Curiae in Support of Respondents at 22–29, *Grutter* (No. 02-241) [hereinafter CEE Brief, *Grutter*]; Brief of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists as Amici Curiae in Support of Respondents at 3–7, *Grutter* (No. 02-241) [hereinafter Civil Rights Movement Brief, *Grutter*].

86. CEE Brief, *Grutter*, supra note 85, at 22–29.

87. The backward-looking component might be labeled corrective justice. See Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 Iowa L. Rev. 515, 529–532 (1992) (defining Aristotelian corrective justice); Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 Iowa L. Rev. 427, 427 (1992) (defining corrective justice as animating principle of tort law). But corrective justice may be considered an unsatisfying explanation for remedies for past racial harms because persons who did not participate in the harms bear the brunt of the remedy rather than the original individuals who actually perpetrated the racial harms. See Coleman, supra, at 429–33 (describing immediate relationship between wrongdoer and person to be compensated). Despite the inexact fit, constitutional scholars have discussed remedies such as school desegregation using the language of corrective justice. See generally, e.g., Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728 (1986) (exploring “corrective aspiration” in context of Reagan Administration school desegregation policy); Peter Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. Pa. L. Rev. 1041, 1041–43 (1984) (determining that segregation imposes on minority students “a system of unfair governance,” defined as “systematic vulnerability of minority students in segregated school districts to discriminatory treatment by public school authorities,” and finding that correcting unfair governance is a constitutionally permissible remedy for racial segregation in public schools). Others have noted the tension between corrective and redistributive conceptions of justice. See Benson, supra, at 535–47 (describing distinctions between corrective and redistributive justice); Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. Rev. 1319, 1323–24 (2004) (arguing that slavery reparations are redistribution, in contrast to most reparations scholars and activists, who view reparations as a means to achieve corrective justice); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence: Fourth Series* 237 (Jeremy Horder ed., 2000) (analyzing relation between distributive and corrective justice).

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them, and the debt owed as a result of these identifiable harms must be repaid by society as a whole.⁸⁸ The unfairness occasioned to individuals not responsible for the “original sin” against African Americans is unfortunate but justifiable under this view.⁸⁹ Given the breadth and depth of the original injury, the scope of the legal injury under the equal protection clause must likewise be broad.⁹⁰

i. *The Grutter Intervenors.* — The vanguard of the distributive justice strand of the coalition supporting the University of Michigan consisted of several student groups. To appreciate why these students have been labeled the vanguard of the mobilization, we must go back to a point in time well before the Supreme Court considered *Grutter* and *Gratz*. After the cases were filed, many commentators assumed that the litigation presaged the death knell of affirmative action.⁹¹ It was during this period that an interracial, but predominantly minority, group of high school, college, and professional students—ascendant elites, many of them future applicants who claimed a direct and compelling interest in affirmative action at selective institutions of higher education—decided to fight the rollback of affirmative action anticipated by the experts.⁹² The ques-

88. See Gewirtz, *supra* note 87, at 731 (stating that corrective justice “requires significant measures to eliminate the ongoing effects of discrimination; it requires remedial intervention that goes beyond the prohibitions of the antidiscrimination principle itself, since merely assuring prospective adherence to that principle will not undo continuing effects of past violations”).

89. Remedying racial injustice historically has been defended on utilitarian grounds; racial healing promotes the nation’s general welfare, civil rights activists claimed. See, e.g., Mary L. Dudziak, *Cold War Civil Rights* 23–46 (2000) [hereinafter *Dudziak, Cold War*] (discussing how view that Jim Crow was a “blot” on the nation provided powerful impetus for federal government’s involvement in efforts to end de jure segregation). The distributive justice strand of the coalition generally did not articulate its arguments with explicit reference to the utilitarian benefits of affirmative action. There were, however, a few exceptions, most notably the brief submitted by members of Congress. See, e.g., *infra* note 121 and accompanying text.

90. Gewirtz, *supra* note 87, at 732–34 (explaining concept of linkage between violation and remedy and noting that “[w]here broad effects are found, a broad remedy seeking to achieve a range of remedial goals is justified”).

91. See Diana Jean Schemo, *U. Of Michigan Draws a New Type of Recruit*, N.Y. Times, Feb. 21, 2003, at A18 (describing how initially the university had believed it should not fight lawsuits because “[e]verybody thought that Hopwood and Proposition 209 were going to sweep the whole country”); Jack E. White, *Affirmative Action’s Alamo: Gerald Ford Returns Once More to Fight for Michigan*, Time, Aug. 23, 1999, at 48 (“Many civil rights lawyers agree that the University of Michigan could be the Alamo of affirmative action, the place where they make their last stand.”); Miranda Massie, *Representing the Student Intervenors in Grutter*, Jurist, Sept. 5, 2003, at <http://jurist.law.pitt.edu/forum/symposium-aa/massie.php> (on file with the *Columbia Law Review*) (explaining that when the cases were filed, “most observers, including most affirmative action supporters, believed that affirmative action was doomed”).

92. Telephone Interview with Miranda Massie, Lead Counsel for Intervenors in *Grutter v. Bollinger* (Oct. 8, 2004) (transcript on file with the *Columbia Law Review*) [hereinafter *Massie Interview*] (describing background and interests of intervenors); see also *Grutter v. Bollinger*, 188 F.3d 394, 398–99 (6th Cir. 1999) (finding that intervenors had substantial legal interest in the case because many were future applicants to the University of

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tion of minority access to higher education was personally significant to these students, and this sense of personal crisis proved a source of inspiration for them.⁹³ These students filed a motion to intervene in *Grutter*, the law school case, on March 26, 1998.⁹⁴

The *Grutter* intervenors consisted of a coalition of three groups: United for Equality and Affirmative Action (UEAA), Law Students for Affirmative Action (LSAA), and the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN).⁹⁵ BAMN, a political organization created in July

Michigan whose admission would turn on whether affirmative action policy was in place); Memorandum of Law in Support of Motion for Intervention (March 26, 1998) granted in *Grutter*, 188 F.3d 394 (6th Cir. 1999) (No. 97-75928) (describing proposed intervenors as prospective applicants to University of Michigan “who are the direct beneficiaries of affirmative action and the direct targets of this lawsuit”); A Call to Action to U-M Students, *Liberator*, Nov. 1997, at 4, available at <http://www.bamn.com/liberator/liberator-1.pdf> (on file with the *Columbia Law Review*) (describing “call to action” by University of Michigan students and noting that “many” minority students would not be at the university without affirmative action because of “fatally flawed” admissions system).

93. See Record of Feb. 7, 2001, at 4–75, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 1998) (No. 97-CV-75928).

94. Katie Plona, Group Files Motion to Intervene, *Mich. Daily*, Mar. 27, 1998, available at <http://www.pub.umich.edu/daily/1998/mar/03-27-98/news/news3.html> (on file with the *Columbia Law Review*); Students File Motion, *supra* note 10. A second student group, represented by the NAACP Legal Defense Fund and the ACLU, intervened in *Gratz*, the undergraduate case. The *Gratz* intervenors limited their defense of the university’s affirmative action policies to the courtroom, an unsurprising development, given LDF’s historic opposition to direct action. See Klarman, Jim Crow, *supra* note 27, at 377–79 (describing NAACP’s opposition to direct action during civil rights era); Mark V. Tushnet, Making Civil Rights Law 309–10 (1994) (describing NAACP’s initial “ambivalence” about the sit-in tactic). The *Gratz* intervenors made remedial arguments in support of affirmative action premised on past and present discrimination. Brief of Respondents Ebony Patterson et al. at 17–29, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). For example, they pointed to the University of Michigan’s own history of discrimination in their brief defending the university’s admissions policies. They noted that the university had operated segregated student dormitories, condoned exclusion of minorities from campus activities and social life, and shown “deliberate indifference” to racial hostility on campus; the university’s race-sensitive policies had initially been instituted after a series of “strikes” by black students, who complained about racial hostility on campus. *Id.* at 9–13, 26–29. Since this Article focuses on law reform campaigns that do rely on protest tactics, the *Grutter* intervenors, rather than the *Gratz* intervenors, are the subjects of my analysis. That either student group successfully intervened in the Michigan affirmative action cases represented a departure. Black student groups were denied the ability to intervene in *Hopwood v. Texas*, the affirmative action litigation involving the University of Texas. See *Hopwood v. Texas*, 21 F.3d 603, 605–06 (5th Cir. 1994) (rejecting argument that university would not adequately represent interests of Black students and denying intervention), *aff’d*, 994 WL 242362 (W.D. Tex. Jan. 20, 1994); see also *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (concluding that the University of Texas Law School may not use race as a factor in admissions decisions).

95. See Massie, *supra* note 91.

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1995,⁹⁶ was the leader of the *Grutter* coalition. The organization originally formed to preserve affirmative action in California's system of higher education;⁹⁷ Proposition 209, however, approved by Californians in 1996, ended affirmative action in California's colleges and universities.⁹⁸ Despite its defeat in California,⁹⁹ BAMN set about a program to prevent the rollback of affirmative action at other colleges and universities and, more broadly, to preserve a multiracial, integrated society.¹⁰⁰

BAMN's involvement in the Michigan affirmative action cases was but one component of its leadership in what it calls "the new civil rights movement." BAMN expressly connects its "mass movement" to the concept of participatory democracy,¹⁰¹ and its purpose is "to defend affirmative action, integration and the other gains of the civil rights movement of the 1960s" through a mass, democratic movement "root[ed] . . . in the

96. See Coalition To Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, About BAMN, at <http://www.bamn.com/1/about.asp> (last visited Apr. 9, 2005) (on file with the *Columbia Law Review*).

97. See *id.*

98. See Dave Leshner, Battle Over Prop. 209 Moves to the Courts, L.A. Times, Nov. 7, 1996, at A1.

99. In 2001, the UC Regents passed a resolution that repealed 1995's Standing Policy 1 and 2, which banned affirmative action in admissions. The effect of the resolution is symbolic only; the UC must still comply with Proposition 209, a state law that banned affirmative action in public hiring and school admissions. The resolution was a symbolic effort to "send a message that underrepresented students are welcome at the nine UC campuses." See S.F. Zook, UC Regents Unanimously Repeal SP-1, SP-2, The California Aggie via U-WIRE, May 17, 2001, LEXIS, News & Business, By Individual Publication, University Wire; see also Press Release, University of California Office of the President, Regents Rescind SP-1 and SP-2, Affirm Diversity Commitment (May 16, 2001), available at <http://www.ucop.edu/ucophome/commserv/access/welcome.html> (on file with the *Columbia Law Review*) (discussing resolution). BAMN claims that on May 16, 2001, it "successfully forced the UC Regents to unanimously vote to reverse the ban on affirmative action in the UC System." See Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary, About BAMN, at <http://www.bamn.com/1/about.asp> (on file with the *Columbia Law Review*).

100. See Why and How We Must Defend Affirmative Action, *Liberator*, Nov. 1997, at 1, 1, available at <http://www.bamn.com/liberator/liberator-1.pdf> (on file with the *Columbia Law Review*) [hereinafter Defend Affirmative Action].

101. See Founding a New Civil Rights Movement, *Liberator*, Sept. 2001, at 1, 1; Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN), Principles, at <http://www.bamn.com/1/go.asp?principles.asp> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*) ("BAMN is a mass, democratic, integrated, national organization dedicated to building a new mass civil rights movement to defend affirmative action, integration, and other gains of the civil rights movement of the 1960s and to advance the struggle for equality in American society by any means necessary."); *id.* ("BAMN is committed to making real the ideal of 'government of the people, by the people, for the people.'"); see also Greg Winter, Thousands of Students Gather Outside Court in Support of Admission Policies, N.Y. Times, Apr. 2, 2003, at A14 (explaining how demonstrators were compelled to protest outside the Supreme Court during oral arguments in *Grutter* and *Gatz*, "in one of the largest demonstrations ever before the Supreme Court," "because of the direct impact any ruling is likely to have on their lives").

courts or in elections [or] in the growing movements on the streets.”¹⁰² Direct action constitutes one of BAMN’s primary tactics. From its inception, the group embraced “marches, rallies, mass meetings and days of action,” as well as educational efforts and lawsuits, as tactics for achieving its goals.¹⁰³ Prior to its involvement in *Grutter* and *Gratz*, BAMN organized protests against Proposition 209 by high school and college students.¹⁰⁴ While cases challenging the initiative’s lawfulness were being litigated, BAMN staged pro-affirmative action demonstrations and occupied buildings at the University of California, Berkeley;¹⁰⁵ held press conferences; published a newsletter, *Liberator*; and created a website to publicize its positions.¹⁰⁶ BAMN’s involvement in the Michigan cases represented the latest phase of a sustained, four-year movement to preserve minority access to higher education.

In leading the movement to defend affirmative action at Michigan, BAMN continued its practice of engaging in both direct and legal action. BAMN staged demonstrations in support of the *Grutter* intervention on several occasions. Prior to and throughout the trial and appeal in the Michigan cases, BAMN and its cosponsors used direct action to raise pub-

102. *Liberator* Declaration, *Liberator*, Sept. 2001, at 2, available at <http://www.bamn.com/liberator/liberator-5.pdf> (on file with the *Columbia Law Review*); New BAMN Principles, *supra* note 13, at 13.

103. *Founding a New Civil Rights Movement*, *Liberator*, Sept. 2001, at 5, available at <http://www.bamn.com/liberator/liberator-5.pdf> (on file with the *Columbia Law Review*); see also sources cited *supra* notes 96–97, 100 (describing BAMN activities).

104. See, e.g., Beth Shuster, *Students Incited to Leave Campus in Prop. 209 Protest*, L.A. Times, Nov. 5, 1996, at B4; *Restraining Order Extended to the UC’s! Picket at the Next Court Proceedings* (Dec. 14, 1996), at <http://www.bamn.com/news/index.asp?single=8> (on file with the *Columbia Law Review*) [hereinafter *Restraining Order*]; *Walkout on November 4* (Oct. 24, 1996), at <http://www.bamn.com/doc/1996/do.asp?961024-flyer.asp> (on file with the *Columbia Law Review*); see also Charles Burress, *UC Protest Rips Policy on Minorities*, S.F. Chron., Mar. 9, 2001, at A19 (discussing BAMN’s sponsorship of several demonstrations since passage of Prop 209); Nat Hentoff, *The War Over Free Speech in California*, *Chattanooga Times*, Oct. 17, 1996 at A7 (discussing BAMN’s organization of anti-209 demonstrations on each of the University of California campuses).

105. See articles cited *supra* note 99; see also *Building Occupation at UC Berkeley* (Apr. 28, 1997), at <http://www.bamn.com/news/index.asp?single=18> (on file with the *Columbia Law Review*); *No Business as Usual at UC Berkeley! Demonstrate* (May 5, 1997), at <http://www.bamn.com/doc/1997/do.asp?970505-flyer.asp> (on file with the *Columbia Law Review*); *Proposal for a Defend Affirmative Action Coordinating Committee, DAACC* (Apr. 8, 1997), available at <http://www.bamn.com/news/archive-launch.asp?4> (on file with *Columbia Law Review*); *Rally and Press Conference* (Apr. 19, 1997), at <http://www.bamn.com/news/index.asp?single=17> (on file with the *Columbia Law Review*) [hereinafter *Rally and Press Conference*]; *Restraining Order*, *supra* note 104.

106. See *Rally and Press Conference*, *supra* note 105; *Statement of Solidarity from the University of Texas* (Oct. 28, 1997), at <http://www.bamn.com/news/index.asp?single=29> (on file with the *Columbia Law Review*). The first *Liberator* is available at <http://www.bamn.com/liberator/liberator-1.asp>. *Liberator* recalls the paper published by the abolitionist William Lloyd Garrison from 1831 through the Civil War. See Aileen S. Kraditor, *Means and Ends in American Abolitionism* 3 (1989).

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lic awareness of the stakes involved in the cases, and to win converts to its “movement.” Beginning on October 16, 2000, BAMN held a ten-day symposium in Ann Arbor to build support for its effort to defeat the threat to affirmative action posed by *Grutter* and *Gratz*. The symposium featured rallies at the law school, speeches by veteran civil rights leaders, and presentations by the student intervenors’ expert witnesses.¹⁰⁷ On the weekend of June 1–3, 2001, BAMN, together with UEAA and Jesse Jackson’s Rainbow/PUSH Coalition, sponsored a pro-affirmative action conference at the University of Michigan that brought together student activists from twenty states and numerous educational institutions.¹⁰⁸

The intervenors’ legal defense of the Michigan policies differed from that of the law school. The intervenors explored a topic that the law school generally avoided—discrimination.¹⁰⁹ They defended the university’s policies on the theory that the law school’s admissions criteria were discriminatory, and that its affirmative action policies were thus a remedy for its discrimination. As the intervenors saw it, the regime of standardized tests of ability on which the law school relied was the linchpin of a racial caste system that kept blacks and Hispanics in inferior schools and jobs.¹¹⁰ The students’ briefs also emphasized that the use of racially biased criteria in admissions perpetuates de facto segregation in K–12 education, college, and law school, as well as discrimination in the workforce.¹¹¹ Thus, the very premise of the plaintiffs’ case—that whites better qualified for admissions than admitted minorities faced discrimination by virtue of affirmative action programs—was false.¹¹²

For BAMN, affirmative action instead should have been viewed as necessary to offset the discrimination that universities engaged in by knowingly relying on biased admissions criteria.¹¹³ The intervenors’ lead

107. See Affirmative Action 102 (Oct. 16, 2000), at <http://www.bamn.com/news/index.asp?single=134> (on file with the *Columbia Law Review*); National Day of Action at U of M a Huge Success! (Oct. 20, 2000), at <http://www.bamn.com/news/index.asp?single=136> (on file with the *Columbia Law Review*).

108. See Founding a New Civil Rights Movement, *supra* note 101, at 1.

109. See *id.* at 3, 6–7.

110. See Kimberly James Brief, *Grutter*, *supra* note 85, at 42–45; see also Massie Interview, *supra* note 92 (discussing role of views on LSAT in *Grutter* litigation).

111. See Kimberly James Brief, *Grutter*, *supra* note 85, at 2–5, 38–46; Record of Feb. 16, 2001, at 76, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928) [hereinafter Feb. 16 Record, *Grutter*] (statement of Miranda Massie) (“There’s a segregation and inequality in K through 12 schooling There’s a set of ways in which race and racism structure the educational experiences and performance of even the most economically privileged minority student.”).

112. See Kimberly James Brief, *Grutter*, *supra* note 85, at 18–20.

113. See *id.* at 40–50 (“Without affirmative action, admissions . . . would consist of a rigid double standard and giv[e] white applicants unearned privileges and advantages Taking account of race is the only way to offset this double standard and to move toward admissions policies that are fair to applicants of all races.”); Feb. 16 Record, *Grutter*, *supra* note 111, at 71 (statement of Miranda Massie) (arguing that “[t]here is a systematic double standard that operates to favor white people . . . [a]nd affirmative action operates to offset that double standard”).

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counsel, Miranda Massie, pegged the Court's ability to uphold race-conscious measures in view of discriminatory admissions criteria on a footnote in Justice Powell's opinion in *Bakke* that stated, "To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."¹¹⁴ The intervenors invoked the specter of Jim Crow in arguing that race-conscious admissions should be viewed as a remedy for credentials bias. They argued that if race-conscious remedies offsetting such bias were eliminated, the integrative ideal established in *Brown v. Board of Education* and affirmed in *Bakke* would be eviscerated.¹¹⁵

ii. *Discrimination-Oriented Amici Curiae*. — Prominent civil rights and civic organizations filed amicus briefs that reiterated and reinforced the *Grutter* intervenors' arguments. The civil rights and civic elites' arguments were predicated on a broad conception of the responsibility of the defendant—and society—to remedy discrimination. Such themes sounded, for example, in briefs by the United Negro College Fund,¹¹⁶ the Coalition for Economic Equity,¹¹⁷ and the American Federation of

114. Final Brief of Defendant-Intervenors, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1516) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978)).

115. Feb. 16 Record, *Grutter*, supra note 111, at 67–70 (statement of Miranda Massie) (defining basic question in case as whether black students who suffered in integrating schools in wake of *Brown* would have suffered "in vain"); see also *id.* at 88 (discussing violence surrounding desegregation of University of Mississippi); Kimberly James Brief, *Grutter*, supra note 85, at 1 ("[G]ains toward integration will be reversed and replaced by a massive return to segregation starting in the most selective universities and spreading throughout higher education and into the society as a whole."). This prediction was disputed by the plaintiffs as well as by Justice Ginsburg. See *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue."); see also Klarman, *Decisions*, supra note 61, at B10 (noting that "[p]roponents of affirmative action [who] have insisted that terminating race-based preferences would dramatically decrease racial diversity on college campuses" had great incentive to exaggerate impact of decision finding it unlawful). In fact, the record on effect on minority enrollment even with a defeat for the plaintiffs has been mixed. Black and Hispanic enrollment at some selective institutions has dropped precipitously since *Grutter* and *Gratz*, in part because some of these institutions have responded cautiously to the split decisions, as if affirmative action had been banned. Their caution is due in part to continuing legal efforts to narrow the scope of affirmative action programs. See Jeffrey Selingo, *Michigan: Who Really Won?*, *Chron. Higher Educ.*, Jan. 14, 2005, at A21 (noting that opponents of affirmative action are aggressively examining allegations of discrimination against white applicants to several colleges and law schools and are enlisting help of U.S. Office of Civil Rights in investigating these claims).

116. Brief of United Negro College Fund et al. as Amici Curiae in Support of Respondents at 6–24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

117. CEE Brief, *Grutter*, supra note 85, at 2–18, 20–21.

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Labor and Congress of Industrial Organizations.¹¹⁸ The National Center for Fair and Open Testing¹¹⁹ and the Society of American Law Teachers¹²⁰ emphasized the disparate racial impact of the LSAT and SAT. Members of Congress submitted an amicus brief that cited a link between access to higher education and fairness in democracy.¹²¹ The most poignant brief making moral arguments in support of Michigan's policies was submitted by two hundred "Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists."¹²² This brief, which discussed the contributions of those whose lives were taken in the struggle for civil rights and equal education opportunity,¹²³ argued that affirmative action was crucial to maintaining the gains won through the ultimate sacrifice.¹²⁴

b. *The Utilitarian Strand of the Coalition.* — The other strand of the *Grutter* and *Gratz* mobilization consisted of Fortune 500 companies, former military officers, educational institutions, and professional associations, as well as prominent individuals. These were establishment elites. This group's support for affirmative action garnered considerable media interest; the backing of a controversial policy by these sectors of society, including risk-averse businesses, was remarkable to some.¹²⁵ The University of Michigan's president at the time, Lee Bollinger, solicited the participation of these amici in the fight to preserve the university's admissions policies. Bollinger first persuaded Harry Pearce of General Motors (GM) to support affirmative action publicly by filing an amicus brief on behalf of the university's policies.¹²⁶ This initial success led sixty-five other Fortune 500 companies, including Microsoft, Coca-Cola, and General Electric, to join the GM brief supporting Michigan in the case before the Supreme Court.¹²⁷ Even more remarkably, at Bollinger's suggestion,

118. AFL-CIO Brief, *Grutter*, supra note 85, at 2–24; see also Brief of the Society of American Law Teachers as Amicus Curiae in Support of Respondents at 3–16, *Grutter* (No. 02-241) [hereinafter SALT Brief, *Grutter*].

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119. See Brief of the National Center for Fair and Open Testing as Amicus Curiae in Support of Respondents at 7–25, *Grutter* (No. 02-241).

120. SALT Brief, *Grutter*, supra note 118, at 16–20.

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121. Brief of John Conyers, Jr., Member of Congress, et al. as Amici Curiae in Support of Respondents at 4–24, *Grutter* (No. 02-241); see also BLSA Brief, *Grutter*, supra note *, at 6–19.

122. Civil Rights Movement Brief, *Grutter*, supra note 85, at 2–6.

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123. On the role of violence in creating a political environment favorable to the passage and implementation of civil rights laws, see Klarman, *Backlash*, supra note 27, at 110–118; see also Michael J. Klarman, *Brown*, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 141–49 (1994) [hereinafter Klarman, *Racial Change*].

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124. See Civil Rights Movement Brief, *Grutter*, supra note 85, at 3–7.

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125. See, e.g., Schemo, supra note 91, at A18.

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126. See Brief of General Motors as Amicus Curiae in Support of Defendant, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-75231); see also Brief of General Motors as Amicus Curiae in Support of Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter GM Brief, *Gratz*].

127. See Lee C. Bollinger, A Comment on *Grutter* and *Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1594 (2003); Schemo, supra note 91, at A18 (stating that Bollinger looked for

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twenty-nine retired military officers, including Generals Norman Schwarzkopf, Wesley Clark, and John M. Shalikashvili, filed an amicus brief in support of race-conscious admissions.¹²⁸ In addition, 3900 colleges and universities, including most of the top U.S. educational institutions, submitted amicus briefs in support of the University of Michigan's policies.¹²⁹

The arguments advanced by the establishment elites differed sharply from those of the student intervenors and the civil rights and civic amici. Their briefs were forward-looking and, they claimed, utilitarian. They were silent on the subject of discrimination. Instead, this strand focused on achieving the greatest good for American society at large.¹³⁰

i. *Business and Military Amici.* — The brief filed by GM revealed that its participation in the case was motivated largely by economic considerations. Most other Fortune 500 companies participating in the coalition joined GM's brief. GM explained that its prosperity, that of American business in general, and, it implied, the entire American economy depended on GM's ability to recruit a diverse and well-educated work force. GM argued that it was necessary for it to have a diverse work force because its customer base in the United States is diverse; minorities' purchasing power in the United States alone was estimated at six hundred billion dollars per annum in 1998. Its argument was also predicated on GM's need, as a part of the global economy, to compete in a marketplace consisting of customers, business partners, and competitors of diverse racial and ethnic backgrounds.¹³¹ In other words, the GM brief argued that ending race-conscious admissions would place it at a competitive disadvantage,¹³² which, in turn, would be detrimental to the American economy, given the company's prominent place therein. The other businesses that filed amicus briefs largely echoed GM's arguments.¹³³

help from the "factories and boardrooms and military" and secured the support of over 300 organizations that signed briefs supporting the university).

128. See Brief of Gen. Julius Becton et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Becton Brief, *Grutter*].

129. See, e.g., Brief of Columbia University et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241) [hereinafter Columbia Brief, *Grutter*]; see also Winter, *supra* note 101, at A14.

130. See Gerald Barnes, Utilitarianisms, 82 *Ethics* 56, 56-64 (1982) (discussing utilitarian goals of maximizing social good and questions of morality that arise as individuals act to further their goals); Stuart M. Brown, Duty and the Production of Good, 61 *Phil. Rev.* 299, 299-311 (1952) (arguing that there is no necessary correlation between morally obligatory acts and good-producing acts).

131. GM Brief, *Gratz*, *supra* note 126, at 1-5, 11-26.

132. Many authorities note that all-whiteness is a competitive disadvantage in a diverse marketplace. See generally, e.g., Rohit Deshpande et al., The Intensity of Ethnic Affiliation: A Study of the Sociology of Hispanic Consumption, 13 *J. Consumer Res.* 214 (1986) (researching differences in relationship between consumption and ethnicity in Texas's Mexican-American community).

133. See Brief of 65 Leading American Businesses as Amici Curiae in Support of Respondents at 3-5, *Grutter* (No. 02-241) ("Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to

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Similarly, the retired military officers' brief claimed that the interests of the Armed Forces dovetailed with the national interest. The military officers claimed that affirmative action was necessary to maintain diversity among the military's officer corps. Diversity is vital to national security, they argued, because it reduces racial and ethnic hostilities among officers and enlisted men and women that undercut morale and impede military preparedness and effectiveness.¹³⁴ The retired officers relied on observations about the Vietnam War to support their contention that the government has a compelling national security interest in diversity within the military's officer corps. Specifically, during the Vietnam era the military's ability to prosecute the war was threatened by strife resulting from tensions between the overwhelmingly white officer corps and the disproportionately African American and Hispanic draftees and enlisted men.¹³⁵ Such strife poses an intolerable threat to national security, the officers claimed.¹³⁶

ii. *Professional and Academic Amici*. — Following the lead of the University of Michigan, the selective college and university amicus curiae briefs claimed that race-conscious admissions policies were necessary to fulfill each institution's particular mission.¹³⁷ In addition, diversity served their collective public mission of educating students to be productive members of a pluralist society and multiracial global economy.¹³⁸ The American Council on Education and a consortium of fifty-three education associations made a similar argument.¹³⁹ The Association of American Law Schools agreed, arguing that a diverse student body produces lawyers who can effectively "serve their clients and the public."¹⁴⁰ These groups, along with the National School Boards Association and the National Education Association, argued that a diverse educational environment prepared students for citizenship.¹⁴¹ Instead of addressing the

succeed in business today demand exposure to widely diverse people, culture, ideas and viewpoints.").

134. Becton Brief, *Grutter*, supra note 128, at 6–7.

135. *Id.* at 6 (noting that "[i]n Vietnam, racial tensions reached a point where there was an inability to fight" (quoting David Maraniss, U.S. Military Struggles to Make Equality Work, *Wash. Post*, Mar. 6, 1990, at A1 (statement of Lt. Gen. Frank Petersen Jr.))).

136. *Id.* at 7.

137. See supra notes 81, 129 and accompanying text.

138. See Columbia Brief, *Grutter*, supra note 129, at 2–4; Brief of Harvard University et al. as Amici Curiae in Support of Respondents at 2–7, 9, *Grutter* (No. 02-241) [hereinafter Harvard Brief, *Grutter*]; see also Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents at 3–8, *Grutter* (No. 02-241).

139. Brief of American Council on Education et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241).

140. See Brief of Association of American Law Schools as Amicus Curiae in Support of Respondents at 9–10, *Grutter* (No. 02-241).

141. *Id.* at 13–30; see also Brief of National Education Association et al. as Amici Curiae in Support of Respondents at 8–27, *Grutter* (No. 02-241); Brief of National School Boards Association et al. as Amici Curiae in Support of Respondents at 6–22, *Grutter* (No. 02-241).

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student intervenors' argument that universities' reliance on biased admissions criteria necessitates race-sensitive affirmative action policies, the amici relied on the diversity rationale for affirmative action.¹⁴²

D. *Implications of the Grutter/Gratz Mobilization*

This Part has sought to shed light on the constitutional culture in which the Supreme Court decided *Grutter* and *Gratz* by identifying the parties involved in the cases and describing their narratives about equality. Although they offered different rationales for affirmative action, the utilitarian and distributive justice strands of affirmative action proponents formed a powerful coalition in support of the university's policies. Together with the CIR and its supporters, these groups constituted a public mobilization of an impressive scope around the issue of affirmative action.

On one reading, the fact and extent of the mobilization affirm the view that the United States is a democracy characterized by vigorous public debate among citizens about important policy and legal issues.¹⁴³ The outpouring lends support as well to the idea that American democracy is pluralist in character.¹⁴⁴ Groups representing racial minorities, women, and labor were among the thousands who participated in the public discourse around *Grutter* and *Gratz*.¹⁴⁵ These groups had access to decisionmakers and the ability to participate in the public debate about affirmative action on the same footing as others. In this way, the *Grutter/Gratz* paradigm supports the notion that citizens can influence decision-making about public policy and constitutional questions simply by being engaged in the issues of the day.¹⁴⁶

My examination of the *Grutter* and *Gratz* litigation does not directly challenge this description of the American political system. Nonetheless, it does substantiate the elite conception of the American political pro-

142. See, e.g., Harvard Brief, *Grutter*, supra note 138, at 14 (relying entirely on diversity approach). The Harvard brief advances the view that students subject to "historical and continuing prejudices" are particularly well suited to yield the educational benefits of a diverse student body. *Id.* at 5; see also Respondents' Brief, *Grutter*, supra note 65.

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143. See Matthew A. Crenson & Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* 1–6 (2004) (contrasting potential for citizen participation in politics with reality of low voting rates, civic decline, and dearth of collective action in contemporary America).

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144. On pluralism, see generally William M. Newman, *American Pluralism: A Study of Minority Groups and Social Theory* (1973) (studying relationships between minority and majority groups in United States); Philip Gleason, *American Identity and Americanization*, in *Concepts of Ethnicity* 57 (William Peterson et al. eds., 1980) (analyzing place of ethnicity in studies and writings on American identity).

145. For a list of the parties submitting amicus briefs in both cases, see Information on Lawsuits, supra note 18.

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146. For discussions of political apathy among Americans and its effect on the body politic, see, e.g., Crenson & Ginsberg, supra note 143, at 1–19.

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cess.¹⁴⁷ As political scientists have long noted,¹⁴⁸ elites wield a significant degree of influence in the legal spaces that are constitutive elements of the American political environment, often through interest groups representing public and private interests on a wide range of issues.¹⁴⁹ Critics charge that these groups, which are largely unaccountable to the public even if they claim to represent the “public interest,”¹⁵⁰ exert a profound and unhealthy influence on democracy. They strangle democracy by usurping public authority, eroding boundaries between the public and private spheres, and further marginalizing those who are disempowered in the political process.¹⁵¹ Elite interest groups attempt to inscribe their

147. On defects of pluralism in practice, see Robert A. Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* 32–37 (1982) [hereinafter Dahl, *Dilemmas*] (discussing elite domination); William A. Gamson, *The Strategy of Social Protest* 9–10 (2d ed. 1990) (reviewing literature criticizing elite influence on politics); Mills, *supra* note 12, at 3–27 (1956) (describing origins and influence on society of elite class in politics, economics, and military).

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148. The influential early literature includes Robert A. Dahl, *A Preface to Democratic Theory* 133–38 (1956) (addressing place of independent organizations, associations, and special interests groups within the democratic state); Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* 104–62 (1961) (discussing decisionmakers in political nominations, urban redevelopment, and public education); Earl Latham, *The Group Basis of Politics* 5–53 (1952) (discussing group theory politics).

149. See generally Elisabeth S. Clemens, *The People’s Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890–1925* (1997) (discussing social origins of interest group politics in United States); Crenson & Ginsberg, *supra* note 143, at xvi–xviii, 2–19 (suggesting that elites never relied exclusively upon mass politics to advance their political and economic goals); Kay Lehman Schlozman & John T. Tierney, *Organized Interests and American Democracy* 32–33 (1986) (noting that middle and upper-middle classes are “backbone” of public interest movement and that there is “pervasive upper-middle class skew[]” within organized interest groups); *id.* at 60–61 (noting that “upper-status individuals—those with high levels of education, prestigious jobs, and high incomes—are much more likely to be members of organizations than lower-status individuals”); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* 211–13, 257–58 (2003) (discussing exclusivity of contemporary forms of civic activism); David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (1951) (addressing role of interest groups in American policy); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in *Civic Engagement in American Democracy* 461, 487–95 (Theda Skocpol & Morris P. Fiorina eds., 1999) (noting embattled link between government and civil society); see also Dahl, *Dilemmas*, *supra* note 147, at 37 (1982) (noting elites’ exercise of influence through pressure groups); Schattschneider, *supra* note 33, at 30–37 (discussing exclusivity of elite domination). On the distinction between public and private interest groups, see Schattschneider, *supra* note 33, at 26–35. On the fuzzy distinction between groups representing economic and noneconomic interests, see *id.* at 23–26.

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150. See Schlozman & Tierney, *supra* note 149, at 28–34 (defining “public interest” groups). On the accountability of “public” interest groups, see Crenson & Ginsberg, *supra* note 143, at 16–17, 176–78 (noting inability of interest groups to represent interests of all members and growing gap between private interest groups and their supposed constituents); Schlozman & Tierney, *supra* note 149, at 399–410.

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151. See Schlozman & Tierney, *supra* note 149, at x–xi, 33 (recounting criticism of interest groups’ role in subverting private-public boundaries); John R. Wright, *Interest*

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policy preferences into law by influencing the structure and outcomes of the political and legal systems.¹⁵² For example, they influence electoral results, shape public opinion, champion their goals through participation—both formal and informal—in legislative and administrative proceedings, lobby for particular judicial and political appointees, and maintain a recurring presence in the legal process through impact and class action litigation, either as parties or as amici.¹⁵³ The courts are “yet another point of access” for elites, and the Supreme Court is more responsive to the perspectives of elites than of others—if only because elites are repeat players in the legal process.¹⁵⁴ Using the courts and these other

Groups and Congress 176–78, 181–86 (1996) (noting an “upper-class bias in the American interest group system” and discussing under-representation of unorganized interests, who are more likely to have lower levels of education, income, and status); see also sources cited *supra* note 149.

152. See generally Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. Pub. L. 287 (1968) (arguing that litigants responsible for a substantial amount of creative and innovative constitutional policy can be labeled as “disadvantaged” and “aggressive”); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957) [hereinafter Dahl, *Decision-Making*] (concluding that “it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a [national] lawmaking majority”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev. 95, 97–104 (1974) [hereinafter Galanter, “Haves”] (arguing that as a result of their status as repeat players, the wealthy are likely to do better than the poor in litigation); Joseph F. Kobylka, *A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity*, 49 J. Pol. 1061, 1061 (1987) (noting that advantaged groups with good access to political branches also use courts to promote their interests); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 697–704 (1963) (discussing strategic use of amicus briefs); Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 Am. Pol. Sci. Rev. 723 (1976) (describing how changes in doctrine of standing have “bestowed on private groups an enlarged measure of discretion in determining public policy”); Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, *Annals Am. Acad. Pol. & Soc. Sci.*, Sept. 1958, at 20 (exploring how organizations “often link broad interests in society to individual parties of interest” and use test-case litigation as a form of political press).

153. See Jeffrey M. Berry, *The Interest Group Society* 154–59 (1989) (discussing litigation as lobbying technique for achieving policy change or stasis); Schlozman & Tierney, *supra* note 149, at 29–30, 148–69, 200–60, 322–42, 358–85 (discussing techniques of influence); Wright, *supra* note 151, at 30–32, 50–53 (discussing legal branches of interest groups and their role in litigation and administrative decisionmaking); Cortner, *supra* note 152, at 304–05 (noting use of litigation by private interest groups in *Baker v. Carr*, 369 U.S. 186 (1962), when legislature was not amenable to change); Krislov, *supra* note 152, at 697–704 (discussing strategic use of amicus filings); Orren, *supra* note 152, at 723–24 (describing how corporate, educational, scientific, and industrial groups determine public policy via litigation); Stephen L. Wasby, *Interest Groups in Court: Race Relations Litigation*, in *Interest Group Politics* 251, 256–70 (Allan J. Cigler & Burdett A. Loomis eds., 1983) (discussing public interest lawyering in race context).

154. Schlozman & Tierney, *supra* note 149, at 378–79 (observing that civil rights groups “work almost exclusively through the courts to achieve their goals”); see Dahl, *Decision-Making*, *supra* note 152, at 194 (asserting that Supreme Court decisions are influenced by “minorities rule, where one aggregation of minorities achieved policies

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strategies, interest groups are able to outperform nongroups on various measures of success in achieving their political and legal agendas.¹⁵⁵ But even if they are not victorious in every battle, their status as repeat players in the political and legal processes makes them agenda setters.¹⁵⁶

When viewed in terms of elite interest group politics and litigation, the *Grutter/Gratz* mobilization, which at first blush seemed to reflect the openness of our democracy, begins to look different. All of the major voices actively participating in the affirmative action litigation were of an elite, decisionmaking class—repeat players and agenda setters in the legal process. This characterization includes the CIR, the relatively young but highly successful organization at the forefront of recent anti-affirmative action efforts,¹⁵⁷ and its ally, the Office of the Solicitor General of the United States, one of the most successful and influential advocates before the Court.¹⁵⁸ The proponents of affirmative action fall into this category as well, including the university and its amici curiae. To cite the most obvious examples of powerful interest groups among these amici, the university's corporate backers employ armies of lobbyists and trade associations to ensure that their interests are articulated and represented before the government.¹⁵⁹ Even the civil rights and civic groups that were coali-

opposed by another aggregation"); Galanter, "Haves," supra note 152, at 119–22 (noting that repeat players have strategic advantages in legal system, where basic features of handling claims are passivity and overload).

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155. See Schlozman & Tierney, supra note 149, at 378 (discussing techniques of influence); see also id. at 382–83 (discussing elite stratification in interest group politics); Dahl, Decision-Making, supra note 152, at 293–94 (concluding that the Court is likely to shift its policy on major policy initiatives incrementally).

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156. See Cortner, supra note 152, at 287–89 (classifying litigation strategies pursued by repeat-player interest groups); Orren, supra note 152, at 723–27 (discussing how interest groups use "an increasing number of suits . . . to obstruct a wide variety of private projects and activities").

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157. See supra Part I.A.1.

158. See Lee Epstein & Karen O'Connor, States and the U.S. Supreme Court: An Examination of Litigation Outcomes, 69 Soc. Sci. Q. 660, 665 (1988) (discussing literature on Office of the Solicitor General, which accounts for scholars' "unanimous[] agree[ment] that those possessing a special office to handle Supreme Court litigation will fare far better than their counterparts"); Lee Epstein & C.K. Rowland, Debunking the Myth of Interest Group Invincibility in the Courts, 85 Am. Pol. Sci. Rev. 205, 208 (1991) (characterizing Office of the Solicitor General as "the quintessential 'repeat player,' the most successful litigator in the federal system"); Krislov, supra note 152, at 714–17 (1963) (calling solicitor general a "regular and prominent participant . . . regularly invited to participate and file a brief").

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159. See, e.g., Ctr. for Responsive Politics, Lobbyist Spending: 3M Co., at <http://www.opensecrets.org/lobbyists/client.asp?ID=18&year=2000> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*) (showing that 3M, one of the sixty-five businesses in support of Michigan, expended over \$1.8 million in lobbying efforts in 2000). The Center for Responsive Politics reports that in 2000, Ford, another of the businesses filing an amicus brief in support of Michigan, spent over \$8 million on lobbying efforts. Ctr. for Responsive Politics, Lobbyist Spending: Automotive, at <http://www.opensecrets.org/lobbyists/indusclient.asp?code=M02&year=2000&txtSort=A> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*). In addition to the individual efforts of Ford, GM, and

tion members are political elites, relatively speaking. The ACLU and LDF are adept at filing impact cases and using amicus briefs to voice their views on civil rights and civil liberties issues and frame debates about them.¹⁶⁰ These groups also speak loudly to Congress on pertinent issues, including the confirmation of nominees to the federal bench.¹⁶¹

Of course, the degree of influence enjoyed by these civil rights organizations does not begin to approach the influence of some of the business, military, and professional organizations that were involved in the cases.¹⁶² We can safely conclude that the LDF is much less successful today than, say, General Motors, a commercial entity whose political activity is the “by-product of organizational wealth,” in advancing its legislative agenda.¹⁶³ Yet the fact remains that by comparison to the average American voter and litigant, all of these amici are a part of an elite group. The

DaimlerChrysler—totaling more than \$17 million in 2000—the Alliance of Automobile Manufacturers (which includes these three manufacturers and six others) spent over \$3 million itself in the same year. *Id.* Lobbyist spending for the communications and electronics industries exceeded \$200 million in 2000. Ctr. for Responsive Politics, Lobbyist Spending: Communic/Electronics, at <http://www.opensecrets.org/lobbyists/indus.asp?Ind=B> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*).

160. See, e.g., Cortner, *supra* note 152, at 306; Kobylka, *supra* note 152, at 1065, 1067–69.

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161. See Tom Jackman, Judicial Nomination Alarms Rights Groups; Some Fear S.C. Jurist Could Further Sway Conservative Federal Appeals Panel, *Wash. Post*, June 25, 2002, at A4 (detailing LDF opposition to confirmation of District Judge Dennis Shedd to Fourth Circuit); David Von Drehle, Turmoil Over Court Nominees; Democrats Dispute Weight of Strategies in Leaked Memos, *Wash. Post*, Jan. 3, 2004, at A2 (describing leaked memo from LDF lawyer to Judiciary Committee members which requested that they “hold off on any 6th Circuit nominees until the University of Michigan case regarding the constitutionality of affirmative action” was decided).

162. See *supra* note 159 and accompanying text.

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163. Kobylka, *supra* note 152, at 1064–65 (describing difference between purposive and material interest groups). Unlike the corporations and corporate associations, which spend hundreds of thousands on lobbying firms (sometimes in addition to their own efforts), the organizations described here rely on other types of advocacy and their own efforts. See, e.g., Ctr. for Responsive Politics, Blue Chip Investors: Top Donor Dossiers (Dec. 13, 2004), at www.opensecrets.org/orgs/index.asp (on file with the *Columbia Law Review*) (listing NEA as third in total contributions to political campaigns and political action committees among all donors since 1989). Recent data suggest that the majority of both ACLU and NAACP lobbying expenditures go to their respective in-house lobbying groups. See, e.g., Ctr. for Responsive Politics, Lobbying Spending: ACLU, at <http://www.opensecrets.org/lobbyists/client.asp?ID=29726&year=1999> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*) (describing ACLU’s 1999 lobbying expenditures); Ctr. for Responsive Politics, Lobbying Spending: NAACP, at <http://www.opensecrets.org/lobbyists/client.asp?ID=93630&year=2000> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*) (describing NAACP’s 2000 lobbying expenditures). The National School Boards Association spent less than \$20,000 on lobbying in 2000. Ctr. for Responsive Politics, Lobbying Spending: National School Boards Assn, at <http://www.opensecrets.org/lobbyists/client.asp?id=93696&year=2000> (last visited Feb. 10, 2005) (on file with the *Columbia Law Review*). On the way in which resources and contact with membership influence degree of access and success, see Schlozman & Tierney, *supra* note 149, at 88–119.

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civil rights organizations are repeat players in the political and legal processes.¹⁶⁴

As we have seen, the political and legal environment in which *Grutter* and *Gratz* were litigated privileged an ahistorical narrative about equality, one that deemphasized discrimination as a rationale for race-conscious admissions in favor of utilitarian diversity rhetoric. This context placed the intervenors at a profound disadvantage in their effort to speak in a different voice about equality and the lawfulness of affirmative action. It destabilized BAMN's effort to champion a genuinely distributive "caste" theory of justice. This is because within this elite context, the intervenors faced the difficult task of playing dual roles and representing competing interests—insiders and outsiders, elites and nonelites—in effect, "serving two masters," to use Derrick Bell's phrase describing inter- and intraracial conflicts of interest in civil rights litigation.¹⁶⁵ BAMN assumed the role of insider elites (Supreme Court litigators), but adopted a legal theory ("caste" or subordination), blunt rhetoric,¹⁶⁶ and demonstration tactics (direct action) typically associated with outsiders. The tension between BAMN's roles exposed the "two masters" problem that has long beset identity-based organizations, but that seldom is discussed.¹⁶⁷

164. Although the scale of their operations is small in comparison to that of the corporate lobbies, groups such as the National School Boards Association and the National Education Association and public interest litigators such as LDF and the ACLU engage in lobbying, publicity campaigns, and litigation to advance their policy preferences. See, e.g., Cortner, *supra* note 152, at 306 (describing aggressive role played by NAACP LDF in desegregation litigation); Kobylka, *supra* note 152, at 1065, 1067–69 (discussing aggressive role played by ACLU in obscenity litigation). The NAACP LDF and ACLU have long been at the forefront of public interest litigation and in fact have served as a practice model for others. See, e.g., Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 *Stan. L. Rev.* 1249, 1255 n.46 (discussing how several groups "have all incorporated organizational structures and law reform efforts based on the model of Thurgood [Marshall] and LDF"); Karen O'Connor & Lee Epstein, *The Importance of Interest Group Involvement in Employment Discrimination Litigation*, 25 *How. L.J.* 709, 713 (1982) ("[T]he NAACP, and later the LDF's expert staff and use of the test case strategy have brought it to the forefront of civil rights litigation and allowed it to stand as a model for other groups both to imitate and to improve upon."); see also *supra* notes 160–163 and accompanying text.

165. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470, 490–91 (1976) [hereinafter Bell, *Two Masters*] (describing conflict between LDF's African American clients and middle-class white and black constituents); see also Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 *U. Pa. L. Rev.* 1913, 1914 (2003) [hereinafter Brown-Nagin, *Identity Caricature*] (noting that in Bell's view, "two masters" applies not only to interracial conflict, but also to intraracial, class-based conflict among African Americans).

166. See, e.g., *Defend Affirmative Action*, *supra* note 100, at 1 ("Liberator rejects the apologetic, tepid tone and language, and the half-stepping, unpersuasive, tokenist argumentation of the reluctant, moderate 'defenders' of affirmative action.").

167. This tension is seldom discussed despite Bell's seminal work in this area and the fact that in-group diversity is becoming increasingly evident as time passes. See Brown-Nagin, *Identity Caricature*, *supra* note 165, at 1919–22 (describing absence of meaningful analysis).

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As an example of how this unspoken problem surfaced in the affirmative action litigation, consider the intervenors' conflict with the university and other proponents—"servile beneficiaries of the status quo," in BAMN's words—who embraced a utilitarian rather than a discrimination-oriented defense of affirmative action.¹⁶⁸ The intervenors faulted the university for using discriminatory criteria and failing to defend minority students in the face of attacks on their ability predicated (in part) on their underperformance with regard to these same criteria. The university's noblesse oblige—allowing minorities to enter its gates, but only on terms with profound dignitary costs—was much less than would be expected from a true advocate of diversity and equality, the intervenors complained. BAMN's criticism of the university and its utilitarian-oriented amici ignored the crucial fact that the intervenors were subject to much the same criticism that they had leveled against the university. By virtue of their status as collegians and ascendant professionals, the intervenors were of a privileged class. Current and future beneficiaries of affirmative action policies at selective law schools are elites, certainly when compared to the typical minority student.

Yet it is important to acknowledge their ascendant and fledging status, relative to that of the establishment elites.¹⁶⁹ Middle-class students of color who are future or current beneficiaries of affirmative action are distinct from middle-class whites. Race shapes status in ways that disadvantage even middle-and upper-income minorities, relative to whites of the same (or even lower) social class.¹⁷⁰ As Professor Dalton Conley and other social scientists have recently demonstrated, middle-class African Americans, for example, are worse off than middle-class whites by numerous metrics of wellbeing.¹⁷¹ That said, their status as elites is clear by

168. See *Defend Affirmative Action*, supra note 100, at 1.

169. This caveat is especially important in light of the fact that most of the students were racial minorities. Even middle- and upper-income minorities are at a disadvantage because of race, relative to whites of the same (or even lower) social class. See Ellis Cose, *The Rage of a Privileged Class* 56–72 (1993); Michael C. Dawson, *Behind the Mule: Race and Class in African-American Politics* 72–75 (1994); Kevin K. Gaines, *Uplifting the Race: Black Leadership, Politics, and Culture in the Twentieth Century* 11, 162–63 (1996); see also infra note 171 and accompanying text. Yet their status as elites is clear by comparison to the overwhelming majority of people of color, who have proportionately less political or legal influence than both whites and higher-income minorities.

170. See Dawson, supra note 169, at 72–75 (1994); see also Cose, supra note 169; E. Franklin Frazier, *Black Bourgeoisie* 43–53 (1997); Gaines, supra note 169, at 11, 19–21, 162–63.

171. For instance, even higher-income blacks have much less wealth on average than whites of the same or even lower income as a result of the intergenerational effects of discrimination. See Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (1999); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 85–86 & tbl.4.4 (1995). For an excellent discussion of these issues within the context of the affirmative action debate, see Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. Colo. L. Rev. 939, 967–89 (1997) (demonstrating that black middle class is systematically worse off than white middle class on numerous economic dimensions).

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comparison to the overwhelming majority of people of color, who have proportionately less political or legal influence than both whites and higher-income minorities.¹⁷²

But judging from BAMN's rhetoric linking affirmative action at selective institutions to the wellbeing of minority communities as a whole,¹⁷³ one would conclude that these students were not privileged at all, and that their interests were perfectly aligned with those of blacks or Hispanics as a whole. Indeed, one would assume that affirmative action policies provide a way out of ghettos for significant numbers of minorities trapped in the nation's central cities. In truth, however, reams of social scientific data demonstrate that the vast majority of children of color who grow up in conditions of entrenched poverty remain there.¹⁷⁴ Rarely do the "truly disadvantaged," to use Professor William Julius Wilson's phrase, make it into the pool of applicants from which selective universities choose their student bodies.¹⁷⁵ The minorities who suffer most and in the greatest number from socioeconomic ills typically are not well positioned to graduate from high school, much less compete for admission to universities like Michigan.¹⁷⁶ When experts talk about the so-called "achievement gap," it is these students whom they most have in mind.¹⁷⁷ There are, of course, exceptions to the rule that minority students from working-class and poor, even abjectly poor, backgrounds do not attend selective colleges. That these students are atypical is confirmed by the occasional news story or book telling their stories of triumph over adversity.¹⁷⁸

172. On the exclusion of working class and poor interests from institutionalized politics and the average person's disaffection with electoral politics, see Crenson & Ginsberg, *supra* note 143, at 49, 98, 138–39.

173. See, e.g., Kimberly James Brief, *Grutter*, *supra* note 85, at 33–37.

174. See, e.g., Gary Orfield & Carole Ashkinaze, *The Closing Door: Conservative Policy and Black Opportunity* 28–29, 45–68 (1991); William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* 57–60, 103, 136 (1987); Guinier, *Admissions Rituals*, *supra* note 5, at 116, 133–36.

175. Wilson, *supra* note 174, at 57–60.

176. See Jonathan Kozol, *Savage Inequalities* (1991) (recounting anecdotal evidence of extreme inequalities in public education); Orfield & Ashkinaze, *supra* note 174, at 103–48 (suggesting that there is no evidence to show that schools "have the capacity, as presently organized, to provide genuine equal opportunity for young people trying to prepare for work or for college"); James E. Ryan, *Schools, Race, and Money*, 109 *Yale L.J.* 249, 255–91 (1999) (discussing separate and unequal schools despite school desegregation and school finance litigation).

177. See, e.g., Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* 11 (1985) (noting that "[p]oor and minority students consistently score lower than do whites" on standardized tests and discussing reasons for inequality); Orfield & Ashkinaze, *supra* note 174, at 116–29 (discussing test score gap); see also Diane Ravitch, *The Troubled Crusade: American Education, 1945–1980*, at 150–81 (1983) (discussing issue of minority underachievement from historical perspective).

178. See, e.g., Ben Carson & Cecil Murphey, *Gifted Hands* (1996) (describing black male author's rise from poverty in Detroit to medical school and renown as a pediatric neurosurgeon); Sampson Davis et al., *The Pact: Three Young Men Make a Promise and*

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These exceptions notwithstanding, it remains true that the issue debated in *Grutter* and *Gratz*—admission to selective public universities—is mainly of interest to minority and white students from middle-class and upper-income households.¹⁷⁹ From the perspective of less well-off minorities, affirmative action is not an ideally redistributive policy. Rather than fighting for policies that have the broadest impact on the greatest proportion of minorities, the intervenors (and the civil rights and civic amici) were pursuing a different and, as I have suggested above, important goal: a more inclusive elite, exemplified by greater numbers of black and Hispanic lawyers.¹⁸⁰ The intervenors were not pursuing an egalitarian admissions system, whatever their rhetoric. Nor is such a system in the interests of middle-class minorities, to the extent that it would reduce the value in the marketplace of degrees from selective universities. In the short term, the intervenors, like the university, desired to preserve the status quo. This was so even though the current system is, by their own admission, discriminatory (because of the credentials gap) and exclusionary (because middle-income and upper-income minorities benefit disproportionately from affirmative action).¹⁸¹

Of course, the intervenors argued—or at least implied—that minority representation in elite law schools enhances the wellbeing of all minorities, regardless of whether individual minorities directly benefit from these policies. The theory of representation that the intervenors advance is ubiquitous and rests on a seldom-doubted assumption that shared racial identity necessarily implies group cohesion and interest convergence.¹⁸² Fortunately, this assumption often bears out. Judging, for example, from recent studies showing that pro bono efforts to aid poor, minority clients are disproportionately undertaken by minority lawyers,

Fulfill a Dream (2003) (describing rise of three black men from poverty in Newark to medical school and successful medical practices); Greg Mathis & Blair S. Walker, *Inner City Miracle* (2002) (discussing rise of underprivileged black male from Detroit from life of crime to law school and judgeship).

179. William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 66–67 (2000) (showing that nine of ten black students admitted to competitive colleges hailed from upper two tiers of socioeconomic strata); Douglas S. Massey et al., *The Source of the River: The Social Origins Of Freshmen at America's Selective Colleges and Universities* 42 tbl.2.10 (2003) (showing that 80% of Asian, 66% of Latino, and 60% of African American freshman at competitive colleges had fathers who had graduated from college).

180. See, e.g., Brief of American Bar Association as Amicus Curiae in Support of Respondents at 6–18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter ABA Brief, *Grutter*] (arguing that a racially diverse legal profession is a compelling state interest for which affirmative action in admissions is a predicate); BLSA Brief, *Grutter*, supra note *, at 4–19 (arguing that racial diversity is integral to leadership role of elite law schools).

181. See sources cited supra note 110.

182. But see Derrick A. Bell, Jr., *Brown v. Board and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 528 (1980) [hereinafter Bell, *Interest-Convergence*] (discussing interest divergence among African Americans over implementation of *Brown*); Brown-Nagin, *Identity Caricature*, supra note 165, at 1924–66 (same).

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we can conclude that the goal of increasing minority lawyers has a positive (albeit indirect) impact on the truly disadvantaged.¹⁸³ But the indirect benefits of affirmative action programs to poor minorities are limited in scope and different in kind from pursuits that directly benefit the neediest. Nevertheless, I do not mean to denigrate the goal of increased minority representation in bastions of educational (and thus, legal, political, and social) privilege. It is a worthy aspiration. Given the present and past structure of society, the burdens of achieving meaningful levels of integration (and impliedly, social justice) must lie, predominantly, on the shoulders of middle-class minorities; they are the only ones with a reasonable chance, in the aggregate, of competing with advantaged whites. Still, the interests of minority student applicants to selective colleges and truly disadvantaged minority students are distinguishable.

Affirmative action in selective institutions of higher education is at the forefront of the civil rights agenda as a result of the interest group dynamics discussed above. It is not the issue that an organization pursuing distributive justice and intent on being an agenda setter—with limited time and resources—would make a priority. Other pursuits, most obviously better elementary and secondary schools, would be more urgent. Nevertheless, the privileging of elite political and legal agendas, as exemplified in the affirmative action debate, is not an aberration; it reflects a historical continuity. As recent historical scholarship has shown, the priorities of elites often have been privileged over theories and strategies of social justice that focused on the plight of the working class and poor.¹⁸⁴

Yet it is also true that organizations pursuing social justice have historically made strategic calculations about their agendas from a defensive posture, and this is no less true today, when the CIR is the agenda setter.

183. Minority lawyers disproportionately engage in pro bono efforts to aid the poor and disproportionately attain employment at nonprofit legal outfits that themselves have a disproportionately minority client base. See, e.g., BLSA Brief, *Grutter*, supra note *, at 9–10 (arguing that because race is connected to so many aspects of legal system and civil society, integration of law schools is especially important); David L. Chambers et al., *Michigan's Minority Graduates in Practice*, 25 *Law & Soc. Inq.* 395, 455–58 (2000) (discussing how minority alumni of University of Michigan Law School provide more service to minority clients, do more pro bono work, and sit on boards of more community organizations than white alumni); Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 *Am. U. L. Rev.* 669, 731 (1997) (suggesting that to achieve better representation within elite law firms people of color must achieve better representation among elite firm clients).

184. See Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* 164–71 (2003) (discussing Communist Party's organizing efforts and collaboration with members of NAACP, Urban League, and other organizations in New York City); Risa L. Goluboff, "We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights, 151 *U. Pa. L. Rev.* 1977, 2010–18 (2003) (discussing race- and class-based rights claims by African Americans during the 1940s that NAACP LDF declined to pursue); see also Brown-Nagin, *Identity Caricature*, supra note 165, at 1949–66 (discussing challenge by poor women to desegregation plan negotiated by a group of biracial elites).

The CIR has made affirmative action a priority by making less than genuine claims about how its litigation advances the interests of the average white citizen. The organization repeatedly situated its lawsuits against the university as a matter of utmost concern to the “average American.” To be sure, every American has (or should have) an interest in how the Court interprets the Constitution. It is also true that working-class whites bear the brunt of affirmative action policies.¹⁸⁵ But as I have noted in the discussion of BAMN’s two masters problem, in fact, the number of students affected by affirmative action policies per capita is relatively small because these policies are only used at *selective* colleges and universities. Such colleges and universities are overwhelming and disproportionately attended by wealthy whites. Hence the named plaintiffs in *Grutter* and *Gratz* were not typical representatives of the class of students applying or admitted to the university, but largely for reasons well beyond affirmative action. We will recall, for example, that Barbara Grutter hailed from a working-class suburb of Detroit,¹⁸⁶ from the type of neighborhood that sends few students to the University of Michigan. The vast majority of students who attend the university are wealthy, nonresident whites,¹⁸⁷ since wealthy whites routinely score higher and post better credentials for admission to Michigan (and similar schools) than in-state whites from working-class and lower middle-class backgrounds.¹⁸⁸

The debate over affirmative action thus obfuscates the most obvious inequality in American higher education. Parental income, education,

185. See Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* 46, 49-52 (1996) (discussing academic commentary finding disproportionate impact of affirmative action policies on the least advantaged whites and concluding that policies have regressive effect); Guinier, *Admissions Rituals*, *supra* note 5, at 121 (noting that working-class whites perceive themselves to bear the burden of affirmative action).

186. Stohr, *supra* note 38, at 45-47.

187. See *Grutter v. Bollinger*, 539 U.S. 306, 360 (2003) (Thomas, J., concurring in part and dissenting in part); Keith Naughton, *A New Campus Crusader*, *Newsweek*, Dec. 29, 2003/Jan. 5, 2004, at 78 (discussing ways in which Mary Sue Coleman, former President of Michigan, tried to “foster more diverse diversity”). Naughton writes,

What Coleman sees is the opportunity to go beyond traditional definitions of affirmative action to create a more “diverse diversity,” based on students from wider socioeconomic backgrounds. She notes that poor kids are nearly as scarce on campus as minorities. Just one in five of Michigan’s 25,000 undergrads comes from a family making less than \$50,000 a year. Coleman is after kids with backgrounds like her father’s, who grew up in Kentucky’s coal country. “Our research shows that all students benefit from having different points of view in a classroom,” she says. “A student from the hills of Kentucky would be quite interesting and different.”

188. See Sturm & Guinier, *supra* note 64, at 990-92 (discussing SAT scores); see also William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 Cal. L. Rev. 1055, 1074-1124 (2001) (analyzing “whether students of color with the same undergraduate grades systematically score lower on the LSAT than white students, even when controlling for factors such as which college they attended and what undergraduate major they selected”).

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and occupational status are the primary positive indicators of whether a student is likely to attend quality elementary and secondary schools and thus a selective university, or any institution of higher education, for that matter.¹⁸⁹ According to a 2003 report by The Century Foundation, seventy-four percent of students admitted to America's 146 most competitive colleges in 1995 "came from the top quarter of the nation's social and economic strata."¹⁹⁰ Less than ten percent came from the bottom half of the socioeconomic strata, and only three percent from the bottom quartile.¹⁹¹ In other words, as Peter Sacks recently explained in the *Chronicle of Higher Education*, "[c]lass, not race, is the grand organizing principle of our education system."¹⁹² Clara Lovett, President of the American Association of Higher Education, similarly argues that notwithstanding egalitarian rhetoric, educational institutions that are pathways to economic security and leadership increasingly serve only to "ratify social advantage" rather than enable "social and economic mobility."¹⁹³ Hence, any organization interested in advancing the goals of the average American student could find a much better target of opportunity than affirmative action.

As I shall next discuss, the discursive framework created by the CIR and the utilitarian strand of affirmative action proponents found expression in *Grutter* and *Gratz*. In light of the sociopolitical dynamics that I have discussed here, it comes as no surprise that the intervenors' effort to

189. See Guinier, Admissions Rituals, *supra* note 5, at 148 (noting that "74% of the students at the 146 most selective colleges and universities come from the upper 25% of the socioeconomic status indicators," that "[o]nly 3% come from the bottom 25%," and "roughly 10% come from the bottom half"); Peter Sacks, Class Rules: The Fiction of Egalitarian Higher Education, *Chron. Higher Educ.*, Jul. 25, 2003, at B7 ("[A]dmissions decisions by America's elite colleges are largely determined long before an application even reaches the admissions office" because "[t]hey are a function of an elaborate, self-perpetuating system of social and economic class that systematically grants advantages to those of privilege.").

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190. Sacks, *supra* note 189, at B7; see also Anthony P. Carnevale & Stephen J. Rose, The Century Found., Socioeconomic Status, Race/Ethnicity, and Selective College Admissions 11 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf (on file with the *Columbia Law Review*) (noting statistical disparities between minority and white matriculants at universities); The Century Found., Left Behind: Unequal Opportunity in Education 3, 7, 9, available at <http://www.tcf.org/Publications/Education/leftbehindrc.pdf> (on file with the *Columbia Law Review*) (noting that students from families in the highest income quartile attend college at a 90% rate, compared with a less than 60% rate for students from the bottom quartile, and that those in the bottom quartile are significantly less likely to graduate from college).

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191. Carnevale & Rose, *supra* note 190, at 11.

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192. Sacks, *supra* note 189, at B7.

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193. Clara M. Lovett, The Perils of Pursing Prestige, *Chron. Higher Educ.*, Jan. 21, 2005, at B20 ("Instead of investing in learning environments that help students of varied backgrounds and preparation succeed, too many institutions now spend their resources aggressively recruiting students with high SAT or ACT scores and other conventional markers of achievement that correlate most strongly with socioeconomic status."); see also David Leonhardt, As Wealthy Fill Top Colleges, Concerns Grow Over Fairness, *N.Y. Times*, Apr. 22, 2004, at A1 (describing predominance of students from wealthy households in college); Sacks, *supra* note 189, at B7 (same).

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fashion an alternative vision of equality by making an issue of credentials bias would achieve limited success.

II. IMPRINTS

Many commentators have described *Grutter* and *Gratz* as definitively resolving an important doctrinal question.¹⁹⁴ *Grutter* is a clear victory for proponents of affirmative action and a certain defeat for its opponents, some argue.¹⁹⁵ This is only partially true. It is plainly the case that *Grutter* forecloses the argument that diversity is an inadequate justification for race-conscious state action.¹⁹⁶ But the meaning of Justice O'Connor's rhetoric enshrining diversity with constitutional significance is far from clear. As others have explained, the *Grutter* majority fails to cogently explain under what circumstances race-conscious policies should be considered sufficiently narrowly tailored to avoid offending the Constitution.

194. See Bollinger, *supra* note 127, at 1589 (describing *Grutter* as having “definitively resolved (at least for a generation) the issue of the constitutionality of affirmative action in American higher education”); Jack Greenberg, Diversity, the University, and the World Outside, 103 Colum. L. Rev. 1610, 1611–12, 1615–20 (2003) (characterizing affirmative action policies as necessary to alleviate the uniquely oppressed condition of African Americans and describing Justice O'Connor's decision in *Grutter* as “path-breaking” in recognizing blacks' unique status, but noting that diversity is a limited rationale for racial inclusion); Lynette Clemetson, NAACP Legal Defense Fund Chief Retires, N.Y. Times, Jan. 16, 2004, at A10 (quoting retiring LDF Chief as saying Michigan cases “ended in a slam-dunk victory affirming the principles we have been fighting for”); Lani Guinier, The Constitution Is Both Colorblind and Color-Conscious, Chron. Higher Educ., Jul. 4, 2003, at B11 (“The Supreme Court's decision was a slam-dunk for affirmative action.”); see also John Aloysius Farrell, Court Backs Diversity in College Admissions: Landmark Ruling Keeps Affirmative Action Alive, Denver Post, June 24, 2003, at A1 (classifying *Grutter* as landmark decision for being first case in twenty-five years “to squarely tackle the question of racial preferences in higher education” by certifying diversity as a “vital national interest”); Tony Mauro, Court Signals No End to Racial Preferences, Recorder (San Francisco), June 24, 2003, at 1 (“The U.S. Supreme Court gave a surprising and historic embrace to the concept of affirmative action in university admissions Monday, dashing the hopes of the Bush administration and conservatives that racial preferences would come to an end.”); David G. Savage, Court Affirms Use of Race in University Admissions, L.A. Times, June 24, 2003, at A1 (noting that decision to uphold affirmative action at colleges “marks a surprising defeat for conservative activists”).

195. See sources cited *supra* note 91.

196. See *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).

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Grutter's ambiguity matters a great deal, both practically¹⁹⁷ and conceptually,¹⁹⁸ for future debates about affirmative action.

Nevertheless, my goal in this Part is not to recapitulate the observations made in the many articles that explore *Grutter* from a doctrinal standpoint or to offer a normative argument about equality discourses. As I initially explained, this Article is written from a cultural and sociopolitical standpoint, and this Part is specific to that perspective. Here, I discuss *Grutter*'s rhetoric as it relates to the project of understanding the relationship among constitutional litigation, interest groups, and social movements. With a view toward that end, this Part observes that the *Grutter* majority opinion reflects Justice O'Connor's appeasement of all of the interests discussed in Part I, in an effort to find consensus amidst cultural conflict. Even as it appeases all, the opinion appeals most to the sensibilities of the mobilization's moderate, utilitarian strand. In fact, the Court's justificatory rhetoric unabashedly invoked the views of the moderate elite interest groups.¹⁹⁹ The CIR's perspective prevails as well, although it was the nominal loser in *Grutter*. The *Grutter* majority rejected the CIR's claim that the Equal Protection Clause requires absolute colorblindness, but Justice O'Connor nevertheless bowed to its worldview, since it overlapped in an important respect with that of the moderates. In the process of finding diversity a compelling governmental interest and affirming

197. Justice O'Connor's opinion leaves numerous details about the proper application of the narrow-tailoring prong of its test for whether diversity-based race-conscious policies open to question. See, e.g., Levine, *supra* note 5, at 513 (2003) (arguing that cases "draw a blurry line between permissible and impermissible admission plans in the higher education context"). The confusion about what kinds of race-conscious programs are permissible is heightened by the fact that the undergraduate policy at issue in *Gratz* was struck down for giving inadequate consideration to individual applicants' qualifications. 539 U.S. at 271–75. Yet the kind of policies at issue in *Gratz* more efficiently generates racially diverse student bodies. Hence, the regime that *Grutter* enshrines is more impractical. In the face of the CIR's ongoing plan to attack affirmative action programs by challenging whether policies are narrowly tailored, the easiest way to comply with the dictates of *Grutter* and *Gratz* is to avoid using race as a factor in admissions. See Guinier, *Admissions Rituals*, *supra* note 5, at 195 ("To assess the qualitative merit of their applicants in a manner consistent with *Grutter* and *Gratz*, public institutions such as Pennsylvania State University, which has 87,000 applicants a year, may feel pressured to hire extra admissions officers to read files."); Levine, *supra* note 5, at 513 ("[U]ncertainty may well lead public elementary and secondary school districts to . . . use clearly race-neutral assignment plans rather than face the risk of having to defend a race-conscious plan through financially expensive and politically divisive litigation.").

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198. See, e.g., Fair, *supra* note 64, at 1857–60 (arguing that *Grutter* encourages white hegemony); Flagg, *supra* note 5, at 837–48 (arguing that *Grutter*'s rhetoric might encourage white resistance to race-conscious policies); Lawrence, *supra* note 5, at 950–59 (arguing that liberal defense of affirmative action overlooks historic and structural discrimination against minorities and fails to challenge subordinating practices). But see Cynthia Estlund, *Taking Grutter To Work*, 7 Green Bag 2d 215, 220 (2004) (arguing that *Grutter* may be grounds for defending race-conscious employment decisions); Post, *supra* note 3, at 58–60 (arguing that *Grutter*'s diversity principle is broader than *Bakke*'s and has far-reaching implications for all of society's institutions).

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199. See *supra* notes 127–130, 131–142 and accompanying text.

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the lawfulness of holistic forms of affirmative action, the *Grutter* majority credited the CIR's view (shared by the university and most amici curiae) that the underlying admissions criteria were sound, or, in any event, not subject to debate. By contrast, the intervenors' discrimination argument met an altogether different fate—silence. Not one Justice who endorsed race-conscious admissions engaged the credentials bias argument of the intervenors.²⁰⁰

The extent to which moderate, elite understandings about equality find expression in the majority opinion is remarkable, but not unexpected in light of the influential roles that elite interest groups generally play in setting political and legal agendas. Even so, the degree to which the views of these particular elites dominate the Court's rhetoric is striking. Significantly, the establishment elites' predominance within the constitutional conversation about equality in *Grutter* and *Gratz* has been celebrated more than scrutinized.²⁰¹ This Part's analysis of their influence and the intervenors' corresponding lack of voice lays the groundwork for the Article's final Part, which questions scholars' claims that law is and should be constitutive in social movements seeking fundamental change.

A. Deference to the Utilitarians

Grutter steers clear of expressions of support for minority interests that are untethered to considerations of the interests of society as a

200. The only Justice who focused on the discriminatory effect of Michigan's admissions standards was Justice Thomas, who believes affirmative action is unconstitutional. See *Grutter*, 539 U.S. at 361–72 (Thomas, J., concurring in part and dissenting in part).

201. See Jonathan Alger & Marvin Krislov, You've Got to Have Friends: Lessons Learned From the Role of Amici in the University of Michigan Cases, 30 J.C. & U.L. 503, 524 (2004) ("The amicus brief from significant leaders of our nation's most trusted institution, particularly during a time of anxiety about national security, validated the claims being made by respondents both about the value of diversity and the necessity of employing race-conscious measures to achieve that goal."); Caminker, *supra* note 21, at 893–94 (noting persuasiveness of military brief); Devins, Explaining *Grutter*, *supra* note 34, at 369–70 ("The amicus curiae filings in *Grutter* and *Gratz* are a testament to the breadth and intensity of support for affirmative action. By detailing the perceived benefits of affirmative action, they provided the Court with information it could use to explain why racial diversity is a compelling government interest."); Guinier, Admissions Rituals, *supra* note 5, at 174–75 ("By citing the amicus briefs of the military and others, Justice O'Connor's opinion for the Court affirmed that the conversation about racial diversity extends beyond the classroom to include the fundamental role of public education in a democracy."); Mike France & William C. Symonds, Diversity Is About to Get More Elusive, Not Less, *Bus. Week*, July 7, 2003, at 30 ("Smart companies have seen the future—and it isn't lily-white. . . . [In the future, t]he majority of Corporate America's new customers and workers are going to be minorities. That's why the business community vigorously defended the University of Michigan's affirmative-action programs in 2003."). But see Guinier, Admissions Rituals, *supra* note 5, at 176–86 (noting limitations of allowing institutional elites to determine upward mobility as advanced by Justice O'Connor and universities); Nelson, *supra* note 21, at 834 (taking cynical view of Court's reliance on military and business arguments).

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whole. The decision principally justifies diversity-based affirmative action in higher education as an engine for advancing the public welfare. That is, the *Grutter* majority fully embraced the utilitarian arguments made by the University of Michigan and the establishment elite amici.

The *Grutter* Court endorsed race-consciousness in admissions because of the “laudable” educational benefits of diversity claimed by the University of Michigan and other educational institutions, including “cross-racial understanding” and the “break[ing] down of racial stereotypes.”²⁰² But what is the purpose of diversity? In resounding terms, the Court answered that diversity is a social good because it is consistent with the interests articulated by the utilitarian strand of the business, military, and professional elite amici, along with the universities.

Justice O’Connor’s justificatory rhetoric invoked the arguments spelled out in the briefs submitted by the establishment elite amici. Those interests include stimulating the global economy,²⁰³ populating the domestic and global workforce with socially intelligent workers,²⁰⁴ and providing legitimacy for the legal profession and the political economy as a whole.²⁰⁵ The Court relied on business and academia’s argument that diversity was needed in order to successfully educate and populate the American workforce with socially intelligent individuals.²⁰⁶ The persuasive force of these arguments was aided by demographic trends, which the Court did not explicitly mention even though they were cited in the briefs, but which are common points of reference in the current sociopolitical environment. Several of the amici curiae who supported the University of Michigan, including the business concerns and military officers, cited the economic and political leverage of racial minorities as a rationale for their support of race-conscious admissions.²⁰⁷

202. See *Grutter*, 539 U.S. at 330–32 (deferring to Michigan and amici curiae’s conclusion that diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals” (quoting Brief of American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter* (No. 02-241))).

203. See *id.* (discussing economic benefits of diversity).

204. *Id.* at 330–33 (discussing view that diverse learning environments better prepare students for workforce than nondiverse schools would).

205. *Id.* (discussing how having minorities in professions confers legitimacy on societal institutions).

206. *Id.* at 330 (“[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” (citing GM Brief, *Gratz*, supra note 126, at 3–4)).

207. See Becton Brief, *Grutter*, supra note 128, at 12–13, 17–18 (noting that “[t]he missions of the United States military services cannot be accomplished without the minority men and women who constitute almost 40% of the active duty armed forces” and stating that “success with the challenge of diversity is critical to national security”); Brief of 3M et al. as Amici Curiae in Support of Respondents at 7, *Grutter* (No. 02-241) (arguing that individuals who have been educated in a diverse setting are “better able to develop products and services that appeal to a variety of consumers” and are “better able to work with business partners, employees, and clientele in the United States and around the

Finally, the majority cited national security as a rationale for upholding affirmative action programs. The Court relied on the argument of former military officers that race-conscious programs are needed to preserve racial diversity in the officer corps, which in turn is crucial to maintaining national security.²⁰⁸ The majority's references to the arguments in the military brief fit seamlessly with contemporary sociopolitical dynamics, since the nation and the world were captivated by the U.S. war against Iraq in the months before *Grutter* and *Gratz* were decided.²⁰⁹

B. *Mixed Signals About Distributive Justice*

The Court's mixed reception to the intervenors' claims was foreshadowed well before its decisions in the affirmative action cases were announced, when the intervenors were "shut out" of the oral argument.²¹⁰ In the district and appellate courts, the university had shared its time with the *Grutter* intervenors' counsel; prior to the Supreme Court argument, Miranda Massie, BAMN's counsel, had understood that the university would again divide its time for argument with the intervenors.²¹¹ Later, the university's lawyers informed Massie that they would not share time during the Supreme Court oral argument—a move that the intervenors

world"). During the period when the cases were pending, "Hispanics" became the largest minority group in the nation, and there has been increased public discussion of the importance of minorities in the marketplace and at the ballot box. See Gregory Rodriguez, *Where the Minorities Rule*, N.Y. Times, Feb. 10, 2002, § 4 (Week in Review), at 6 (highlighting that "Hispanics are on the verge of becoming the largest minority group" and describing political and economic changes due to Hispanics' "growing demographic presence"); see also U.S. Census Bureau, *The Hispanic Population: Census 2000 Brief*, at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> (on file with the *Columbia Law Review*) (providing profile of Hispanic population in United States).

208. *Grutter*, 539 U.S. at 331 (noting that "high-ranking retired officers and civilian leaders of the United States military assert that '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security'" (quoting Becton Brief, *Grutter*, supra note 128, at 5)).

209. See President Bush Addresses the Nation (Mar. 19, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (on file with the *Columbia Law Review*) (announcing that U.S. had begun "military operations to disarm Iraq, to free its people and to defend the world from grave danger"). Judging from past episodes, the war footing is significant; war engenders a patriotic ethos that can sometimes have a positive effect on race relations or on the pursuit of racial justice, such as during World War II. See, e.g., John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* 475–504 (8th ed. 2000) (describing effects of World War II, the "Four Freedoms," the emergence of the UN system, and the rise of community ideology of racial equality in the black experience in the United States); Richard M. Dalfiume, *The "Forgotten Years" of the Negro Revolution*, 55 J. Am. Hist. 90, 103–06 (1968) ("[T]he war was working a revolution in American race relations.").

210. See Jodi S. Cohen, *Ruling Bars Minorities in U-M Case*, Detroit News, Mar. 11, 2003, at 1D (quoting one of the students' lawyers as saying "U-M lied to us" by reneging on an earlier promise to cede some of their time to the intervenors during the Supreme Court argument).

211. See Stohr, supra note 38, at 256.

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characterized as a betrayal.²¹² The intervenors then petitioned the Court to enlarge the time for argument in *Grutter* by ten minutes so that the students could add their distinctive perspective to the oral argument.²¹³ Specifically, the students wanted to present “uncontested evidence” that the admissions criteria used by the law school perpetrated “racial bias and discrimination” that affirmative action remedied.²¹⁴ The Court denied the request.²¹⁵ Massie characterized the Court’s action as a “preference for leaving [the university’s] own prejudices undisturbed.”²¹⁶ She went on to question how the Court could “reach an intelligent conclusion on whether affirmative action is fair and legal without taking account of the unearned advantage for white people in the admissions system.”²¹⁷

The *Grutter* opinion itself rejected the two varieties of discrimination-based arguments proffered by the distributive justice strand of the coalition defending Michigan’s policies. The credentials bias argument was its central claim, but the intervenors also pointed to a second, interrelated form of bias. This was the claim that the existing maldistribution of education, employment, and other goods resulted from past and present dis-

212. Id. at 256–57; Maryanne George, Students Can’t Address Supreme Court in U-M Case: Intervenors Say They Expected Chance to Speak, Mar. 11, 2003, Detroit Free Press, 2003 WL 2544127 [hereinafter George, Students] (quoting lawyer as noting that student intervenors would be forced to watch the proceedings rather than participate in them, thus relegating “the Black man . . . [to] the damn gallery again”). Although no one other than the parties can contest the validity of the betrayal argument, it is clear that the litigators for the University of Michigan did not want the students and LDF/ACLU’s argument made before the Supreme Court. See M. Wood, *Grutter Litigators Explain Strategy Used to Win Affirmative Action Case*, Apr. 1, 2004, at http://www.law.virginia.edu/home2002/html/news/2004_spr/grutter.htm (on file with the *Columbia Law Review*) (noting that the university’s lawyers rejected LDF’s proposed strategy of arguing that diversity argument in *Regents of the University of California v. Bakke* was not the best justification for affirmative action). Nonetheless, one of the university’s attorneys now claims that they did want to offer an argument broader than *Bakke*’s diversity rationale. See Caminker, *supra* note 21, at 894 (“From our perspective as litigators, we knew that we wanted to push beyond *Bakke*.”).

213. See Motion for Enlargement of Argument Time and for Divided Argument, or in the Alternative, for Divided Argument, *Grutter* (No. 02-241) [hereinafter Motion for Enlargement]. The university did support the students’ petition to expand the amount of time for argument, however. See Jeremy Berkowitz, U. Michigan Student Intervenors Denied Time to Give Oral Arguments, *Michigan Daily*, Mar. 10, 2003, 2003 WL 14059945. Had the university joined the motion for divided time, it would almost certainly have been granted. See, e.g., Crawford v. Martinez, 124 S. Ct. 2851 (2004) (denying additional time but granting parties’ joint request for divided argument); *Comm’r of Internal Revenue v. Banks*, 125 S. Ct. 28 (2004) (same).

214. Motion for Enlargement, *supra* note 213, at 2; Stohr, *supra* note 38, at 257.

215. See Supreme Court of the United States, Docket 02-241, available at <http://www.supremecourtus.gov/docket/02-241.htm> (last updated Jun. 30, 2003) (detailing docket in *Grutter v. Bollinger*).

216. Berkowitz, *supra* note 213.

217. George, Students, *supra* note 212.

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crimination.²¹⁸ Both forms of discrimination justified affirmative action, according to the intervenors.

One aspect of the *Grutter* majority opinion seemed responsive to the distributional claim, however. A single but powerfully rendered paragraph in *Grutter* responded to the claim that the overwhelmingly white elite law schools that would follow the end of affirmative action admissions would undermine the credibility of the legal system and legitimacy of America's multiracial democracy.²¹⁹ Noting that federal judges and most members of Congress are lawyers and that many are graduates of elite law schools, the Court conceded that professions such as law are conduits to leadership. The majority then charged that the "path to leadership" must be "visibly open to talented and qualified individuals of every race and ethnicity" if leaders are to have "legitimacy in the eyes of the citizenry."²²⁰ This comment provided the most morally focused argument for race-conscious admissions in the majority opinion.

This passage was filled with utilitarian rhetoric in addition to the distributional argument. Justice O'Connor discussed the impact of an all-white aesthetic in the legal profession on society as a whole; notably, she avoided directly discussing the putative beneficiaries of affirmative action themselves, or their right to equal access to selective institutions of higher education. The predominant line of reasoning running through the Michigan opinion remained that affirmative action furthers the interests of whites as a group, even if such programs sometimes deny individual whites access to certain selective institutions of higher education. In other words, the interests of the majority converged with the interests of the minority, and it is this convergence that justified programs that otherwise would be deemed unlawful.²²¹

Justice Ginsburg stood alone in emphasizing historicist rationales for affirmative action,²²² in contrast to the *Grutter* and *Gratz* majorities, which

218. See *supra* notes 109–115 and accompanying text.

219. The amicus brief of the Harvard, Stanford, and Yale BLSAs makes this argument, as does the ABA's amicus brief, though neither was cited by the Court. See BLSA Brief, *Grutter*, *supra* note *, at 6–28; ABA Brief, *Grutter*, *supra* note 180, at 13–17.

220. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

221. See Bell, Interest-Convergence, *supra* note 182, at 523 (1980) (propounding interest convergence thesis, which holds that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites"). In his recent commentary on *Grutter* and *Gratz*, Bell has described the split decisions as a "definitive example" of the interest convergence theory. See Derrick Bell, Diversity's Distractions, 103 Colum. L. Rev. 1622, 1624 (2003). For other scholarly analyses of American race relations that draw on Bell's theory, see Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 64 (1988) (explaining that demise of Jim Crow corresponded with American interest in countering Soviet propaganda criticizing American sociopolitical system); Lani Guinier, From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma, 91 J. Am. Hist. 92 (2004) [hereinafter Guinier, Interest-Divergence].

222. See *Grutter*, 539 U.S. at 344–45 (Ginsburg, J., concurring); *Gratz v. Bollinger*, 539 U.S. 244, 298–305 (2003) (Ginsburg, J., dissenting).

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did not refer to historical wrongs. The question of whether slavery and Jim Crow justified race-sensitive admissions was deemphasized in the Court's embrace of the diversity rationale. Although some have noted that the diversity rationale is more convincing when conjoined with an historicist argument, in the *Grutter* majority's rendering, diversity looks forward rather than backward. That said, two references in the opinion arguably acknowledged the country's racial past: Justice O'Connor remarked that "race unfortunately still matters"²²³ and suggested that pedagogical benefits may flow from affirmative action beneficiaries because "our Nation's struggle with racial inequality" will color their experiences.²²⁴ The first reference was too fleeting to be of consequence. The second spoke to utilitarian benefits that flow from affirmative action, rather than to historical discrimination in the sense that the intervenors pressed upon the Court. The intervenors (and the civil rights and civic amici) wanted an admission that America's tortured racial history had diminished the opportunities of African Americans and other minorities to accumulate intellectual and social capital. Therefore, past discrimination had inexorably tilted the playing field in favor of whites. This was an admission that O'Connor did not make.²²⁵

C. Silence on the Credentials Bias Claim

The *Grutter* majority responded to the credentials bias claims of the intervenors with silence. As discussed above, the intervenors argued that the university's reliance on racially discriminatory admissions criteria was the root cause of its "need" for race-conscious admissions policies. Given the built-in advantages that they possessed in the admissions process, the plaintiffs were more victors than victims. Neither the plaintiffs nor the university challenged the credentials bias claim.

Two dissenters, Justices Rehnquist and Kennedy, discussed the magnitude of the credentials gap between the university's affirmative action admits and rejected white applicants. Pointing to the gap as evidence for

223. *Grutter*, 539 U.S. at 333.

224. *Id.* at 338.

225. Universities located in states with such histories would have offered a more logical context in which to consider what quantum of evidence justifies race-conscious admissions on a corrective rationale. Tellingly, the CIR has chosen to steer clear of such institutions. See Caminker, *supra* note 21, at 891 (noting CIR avoided filing an action against the University of Virginia because it "wanted to avoid a school that could plausibly offer a remedial justification for affirmative action"). This is not to say that the pasts of the University of Michigan or Michigan State University are free of racial discrimination. Quite the contrary is true. In fact, a prior decision has acknowledged Michigan's history of racial discrimination. See *Milliken v. Bradley*, 418 U.S. 717, 791-93 (1974) (Marshall, J., dissenting) (arguing that Michigan's legislature and board of education pursued activities resulting in *de jure* segregation in Detroit); see also Thomas J. Sugrue, *Origins of the Urban Crisis* 266 (1996) (explaining racial politics surrounding *Milliken* decision as creating backlash against growing black power in Detroit, resulting in white resistance, which included support for white conservative candidates for public office).

the CIR's claim that minority beneficiaries of affirmative action were less deserving of admission than whites,²²⁶ the Justices' perspective tracked that of the dissent in the Sixth Circuit's opinion finding the university's race-conscious policies lawful.²²⁷

Yet none of the Justices who supported race-conscious admissions engaged the intervenors' argument.²²⁸ Justice O'Connor seemed to discount the notion that race-sensitive admissions should be viewed as a remedy for discriminatory admissions criteria, however. In response to the district court's suggestion that "decreasing the emphasis for *all* applicants on undergraduate GPA and LSAT" would diminish the need for race-conscious measures,²²⁹ Justice O'Connor deferred to the law school's judgment about how best to assemble student bodies with a critical mass of minority students. The district court's suggestion would be a "drastic remedy that would require the Law School to become a much different institution."²³⁰ "Academic selectivity" is a "cornerstone of [the University of Michigan's] educational mission" that it should not have to sacrifice for the sake of diversity, O'Connor wrote.²³¹

Justice Thomas countered Justice O'Connor's statement with the claim that the law school's use of race-conscious measures should be viewed as the more drastic remedy.²³² Given the noxiousness of race-consciousness to the Equal Protection Clause under conventional accounts, it would seem preferable for universities to cease relying so heavily on criteria that they acknowledge systematically disfavor blacks and Hispanics. Justice Thomas's rejoinder went unanswered.

226. See *Grutter*, 539 U.S. at 380–85 (Rehnquist, J., dissenting); *id.* at 389–92 (Kennedy, J., dissenting).

227. See *Grutter v. Bollinger*, 288 F.3d 732, 796–800 (6th Cir. 2002) (discussing magnitude of preference for underrepresented minorities).

228. See *supra* note 200 and accompanying text. The parties' status as intervenors would not have limited the Court's ability to address their argument. In fact, in two recent cases the Court not only granted intervenors' time to make specific arguments, but also discussed intervenors' arguments extensively in its opinion. See *Utah v. Evans*, 535 U.S. 903 (2002) (allowing intervenor, the state of North Carolina, additional time for oral argument); *Utah v. Evans*, 536 U.S. 452, *passim* (2002) (addressing intervenor North Carolina's arguments extensively); *Zelman v. Simmons-Harris*, 534 U.S. 1111 (2002) (allowing intervenors, nonpublic schools participating in voucher program, additional time for oral argument and addressing their arguments). These cases arguably are distinguishable because the university opposed the BAMN intervenors' motion for additional time and because the intervenors' argument arguably was averse to the university. Even crediting these arguments, though, nothing prevented the concurring justices from mentioning the intervenors' claim. The silence could of course be a function of the kinds of behind-the-scenes maneuvering in which Justices engage when attempting to reach consensus on a contentious issue.

229. *Grutter*, 539 U.S. at 340 (emphasis added).

230. *Id.*

231. *Id.*

232. *Id.* at 361 (Thomas, J., dissenting).

D. *Conclusion*

Grutter offers no coherent theory of justice because it gives every major constituency involved in the affirmative action debate a bit of what it wanted to hear. The dominant rhetorical tone of the opinion is moderate, elitist, and utilitarian. Although the value of this rhetorical strategy is an open question,²³³ it has obvious appeal. By issuing a split decision and relying on the support of powerful business, academic, professional, and military interests, the Court appeased those who offer lukewarm support for minority racial preferences and avoided alienating those who oppose the policies altogether.²³⁴

But this strategy arguably came at a high cost. To the extent that the Court's emphasis on utilitarian concerns is viewed as a repudiation of the arguments urged by the mostly minority distributive justice strand of the

233. *Grutter* and *Gratz*'s thinly veiled appeal to public opinion may serve as a clarion call to opponents of affirmative action who were outdistanced in their effort to rally public opinion around affirmative action by moderate and liberal supporters of these programs. Indeed, this is the lesson of the abortion rights movement, which impressed the Court with a barrage of amicus filings in *Roe v. Wade* and won a legal victory, but at the same time unleashed an onslaught of activism by pro-life forces. The anti-affirmative action groups can be expected to attempt to organize the public in opposition to affirmative action policies that seem vulnerable under the *Grutter/Gratz* formulation, especially given the *Grutter* majority's reference to the presumptive unconstitutionality of race-conscious programs in the future. Justice Scalia's dissent is largely a roadmap for legal challenges to admissions policies under the *Grutter/Gratz* standard. See *id.* at 347–49 (Scalia, J., dissenting). The CIR continues its effort to effectively end affirmative action by ensuring that universities' policies are narrowly tailored to the (uncertain) degree contemplated in *Grutter*. CIR General Counsel Michael Rosman has discussed his position on the narrow-tailoring questions left unanswered by *Grutter* and *Gratz*. See Michael Rosman, Uncertain Direction: The Legacy of *Gratz* and *Grutter*, *Jurist*, Sept. 5, 2003, at <http://jurist.law.pitt.edu/forum/symposium-aa/rosman.php> (on file with the *Columbia Law Review*); see also Terence J. Pell, Camouflage for Quotas, *Wash. Post*, June 30, 2003, at A15 (remarking that "holistic" review approach to admissions is not feasible because "[i]f . . . universities follow suit, and they are true to their word, America will soon have more admissions officers than Iraq has allied soldiers"); Peter Schmidt, At U. of Washington, a First Test of the Michigan Rulings, *Chron. Higher Educ.*, Mar. 19, 2004, at A20 (recounting CIR's Ninth Circuit case against the University of Washington School of Law).

234. In approaching the affirmative action decisions with its ears toward the political winds, the Court seemed to recapitulate a strategy used in the 1990s cases challenging abortion rights, in particular *Planned Parenthood v. Casey*, 505 U.S. 833, 876–77 (1992), which established the "undue burden" test for whether a restriction was lawful. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *St. Louis U. L.J.* 569, 629 (2003) (discussing plausibility of public opinion influence on Supreme Court in high profile cases, such as abortion, as a way of explaining O'Connor's apparent shift in attitudes on this issue); William Mishler & Reginald S. Sheehan, *Popular Influence on Supreme Court Decisions*, 88 *Am. Pol. Sci. Rev.* 711, 716–17 (1994) (propounding theories to explain why public opinion impacts the Court); see also Devins, *Explaining Grutter*, *supra* note 34 (discussing social and political forces underlying *Grutter* and *Gratz*); cf. *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989) (O'Connor, J.) ("The public sentiment expressed in [opinion] polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.").

coalition, *Grutter* sends paradoxical signals. It celebrates pluralism while demonstrating the extent to which whites—elite organized interests, in particular—set the terms of the legal and political debate about the meaning of the Equal Protection Clause.²³⁵ Viewed in these terms, the diversity rationale for affirmative action, at least as advanced by the university and articulated by Justice O'Connor, reinforced the political status quo and denied the possibility of meaningful pluralism.

On the other hand, the intervenors prevailed in their bid to maintain affirmative action at the University of Michigan Law School. The CIR did not achieve its immediate goal—ending race-based affirmative action in higher education across the board. *Grutter* affirmed the constitutionality of the law school's admissions practices;²³⁶ in fact, the majority held up the law school's carefully calibrated race-sensitive policy as a model to be followed by other institutions, including the undergraduate college.²³⁷ The intervenors represented a core part of the coalition of litigators whose advocacy preserved race-conscious affirmative action at selective universities. They helped to prevent the "re-segregation" of higher education—the fate that the university's supporters predicted would have ensued had it lost both of its cases.²³⁸ Nevertheless, as discussed in the next Part, from a social movement perspective, the intervenors' victory actually looks like a defeat, or, at the very least, a much narrower success.

III. IMPLICATIONS

The legal literature on social movements speaks in a different voice about popular efforts to effect change than does the literature developed by sociologists, political scientists, and social historians.²³⁹ Constitutional²⁴⁰ and legal mobilization theorists²⁴¹ typically write about social movements from a perspective internal to law. The discussions of these scholars pivot around the legal system and, more particularly, around judges and the texts that they interpret in the adjudication process. They assume that the interpretation or creation of favorable constitutional law is a fundamental component of a social movement's agenda. Consequently, these scholars make positive and normative claims about how the rule of law, constitutional text, and rights litigation (or the threat of such

235. Accord Bell, Interest-Convergence, *supra* note 182, at 524 (proposing that whites only act in favor of minorities when it is in their interests to do so, rather than because of independent value to minorities of remedial action).

236. 539 U.S. at 327–43.

237. See *Gratz*, 539 U.S. at 268–75 (contrasting undergraduate point system with law school's holistic system); see also *id.* at 276–80 (O'Connor, J., concurring) (same).

238. See *supra* notes 75–77 and accompanying text.

239. See Rubin, *supra* note 24, at 2, 45–48 (noting that "legal scholars seem largely oblivious to the extensive social science literature on social movements").

240. See *supra* notes 27–32 and accompanying text.

241. See *supra* notes 24–26 and accompanying text.

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litigation) shape social movements,²⁴² as well as how social movements, in turn, shape the law.²⁴³ This literature is a welcome addition to constitutional scholarship that traditionally overlooked the ability of ordinary people to influence the path of the law.²⁴⁴

This Part suggests that the scholarship on law and social movements is nevertheless in need of further refinement because the power of law is still exaggerated in the literature. Given the hegemony of law in our society, the positive claim of legal scholars that law is definitive in social relations and that judges are pivotal as arbiters of these relations is undeniable. It is the normative implication of the positive claim—the assumption that (judge-made) law should define social movements—that is troubling. It is contrary to my understanding of how social movements have interacted with law over time and how they are best positioned to achieve their goals. Nineteenth- and twentieth-century social movement history, as well as the social science literature, counsel that law and social movements are fundamentally in tension. They teach that social movements attain leverage in the political and legal processes by engaging in disruptive protest action taken outside of institutionalized political structures; that legal and political change are codependent, but that influence runs from politics to law; and that law can both harm and help social movements in unintended ways.²⁴⁵

Legal scholars' commitment to the primacy of law in their analyses of social movements obscures the important distinction between *inspirational* and *definitional* roles that law may play in social movements. Consequently, these scholars overstate law's capacity to trigger social movements and undervalue nonlegal, noninstitutional forms of political activism. Additionally, these scholars overestimate the positive influence that legal rhetoric and norms have on social movements as they evolve. In the process, legal scholars perpetuate juricentrism and encourage the tendency among lawyers representing social movements to privilege constitutional litigation. But constitutional law has historically been a limited and unreliable agent of distributive justice.²⁴⁶ The limited, if not altogether ineffectual, nature of law is particularly evident in the Supreme Court's jurisprudence on education.²⁴⁷ The experience of the *Grutter* intervenors, when read against relevant history and literature, illustrates

242. See *supra* notes 24–25 and accompanying text.

243. See *supra* notes 26–28 and accompanying text.

244. The generalization encompasses most of the constitutional scholarship about post-New Deal changes in racial, gender, and other status laws which celebrates the Warren Court while giving insufficient attention to nonjudicial actors and action.

245. See *supra* notes 26–28 and accompanying text.

246. See Klarman, Jim Crow, *supra* note 27, at 443–68 (examining judicial decisionmaking and constitutional law in relation to social justice); Rosenberg, *supra* note 27, at 15–21 (describing how courts lack tools to implement and enforce social reform); see also *supra* notes 84–90 and accompanying text (describing arguments for distributive justice).

247. See *infra* notes 416–419 and accompanying text.

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these points, as I demonstrate below. Ultimately, these sources suggest answers to the question of whether or under what circumstances a law reform campaign can simultaneously constitute or generate a social movement, and on what terms such a hybrid entity should frame its agenda in the language of constitutional law.

A. *Constitutional Theory on Social Movements*

In a recent symposium article on social movement scholarship, Professor Edward Rubin noted that legal scholars seem “oblivious” to the social science literature on social movements.²⁴⁸ He assumed that this lacuna results from the juricentrism of law.²⁴⁹ Professor Bill Eskridge’s interdisciplinary, theoretically sophisticated, and wide-ranging work on social movements suggests that Rubin is only half right. Eskridge, the leading legal theorist of social movements, is well versed in the literature and finds it wanting.²⁵⁰ The major objective of his scholarship is to correct the fact that “law and even legal actors” are “bit players” in social movement theory (written by social scientists).²⁵¹ Eskridge freely acknowledges that social movements have “generated many important statutes we now take for granted”²⁵² and contributed more to the “modern meaning of the Equal Protection Clause” than “the Fourteenth Amendment’s framers.”²⁵³ But his aim is to demonstrate that “[l]aw and legal actors are critical to the instigation and dynamics, as well as the goals, of [the identity-based social movement].”²⁵⁴

Eskridge notes that identity-based social movements have been “rights oriented” all over the world and have presented their goals in “constitutional terms.”²⁵⁵ For Eskridge, “social movements are surrounded by and seek to influence law.”²⁵⁶ Law is a “pervasive positive and normative context in which the social movement operates,”²⁵⁷ and therefore, he says, a “movement’s struggle will inevitably involve law.”²⁵⁸ From there, Eskridge reasons that the “[p]rimary normative question for constitutional law professors” is: “What ought to be the role of judges in the evolution of social movements?”²⁵⁹

248. See Rubin, *supra* note 24, at 2.

249. *Id.* at 55.

250. See Eskridge, *Channeling*, *supra* note 24, at 420–21 (“The social movements literature does not adequately reflect the importance of law.”).

251. *Id.* at 421.

252. *Id.* at 419; see also Eskridge, *Identity*, *supra* note 24, at 2353–55 (acknowledging legal changes achieved by identity-based social movements).

253. Eskridge, *Channeling*, *supra* note 24, at 419.

254. *Id.* at 421–22.

255. *Id.* at 422–23.

256. *Id.* at 420.

257. *Id.*

258. *Id.*

259. *Id.* at 423. Eskridge’s commitment to juricentrism is consistent with his scholarship on the “new legal process” theory. Dynamic judicial review that emphasizes

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Eskridge moves seamlessly from the observation that social movements must engage the law to a theory of judicial review of movements' claims. He assumes that social movements should be afforded the "protections of the rule of law."²⁶⁰ The rule of law is a double-edged sword for social movements in Eskridge's normative vision, however. He writes,

If the goal of our constitutional polity is preservation and adaptation of a peaceable pluralism, the judiciary is a necessary safety valve. Therefore, I argue that the judiciary needs to accommodate emerging social movements—as well as countermovements. Under the premises of pluralist theory, this accommodation is in the interests of the country but may not be in the interests of some elements of the social movements, for a clever judicial strategy empowers the movement, moderates over the radicals, and channels the movement's discourse in assimilative directions.²⁶¹

When he considers modern constitutional history, Eskridge concludes that "the Supreme Court's constitutional jurisprudence has usually served the pluralist polity pretty well."²⁶² Social movements have generated claims to which the Supreme Court and legislatures responded favorably, in modern times, through "dynamic interpretations of the Constitution" and the creation of "super-statutes" (pervasive, preference-transforming laws).²⁶³ Eskridge is unapologetically juricentric. His interest in social movements is premised on their functionality in the legal system, of which they necessarily are a part, given the role of the law in regulating status and defining identities.²⁶⁴ Law and social movements are partners in creating social stability and controlling disorder, even violence.²⁶⁵ Like any apparatus of the state, social movements are methods of social

"moderation" is a central component of his theory. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1479–81 (1987) (arguing that "statutes, like the Constitution and common law, should be interpreted dynamically"); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 737–91 (1991) (discussing how "new public law" has moved "beyond legal process").

260. Eskridge, *Channeling*, *supra* note 24, at 423; see also *id.* at 521 ("Once a minority starts to mobilize as a social movement, the Court ought to protect the minority group's expression and association from state interference and ought to strike down the most serious state penalties against the group.").

261. *Id.* at 423.

262. *Id.*

263. *Id.* at 499. For more on Eskridge's notion of "super-statutes," see William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215 (2001) (exploring theories and implications of super-statutes).

264. See Eskridge, *Channeling*, *supra* note 24, at 422 (discussing how law served as forum for minority groups to "contest[] their status denigration" and "reclaim their personhood").

265. See *id.* at 423 ("If emerging social movements are not assured both the protections of the rule of law and, potentially, the recognition suggested by the Equal Protection Clause, the danger of violent conflict is theoretically increased.").

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control, Eskridge implies, thereby confirming critics' complaint that law maintains and legitimates the existing sociopolitical order.²⁶⁶

Eskridge's scholarship in this area is profound and refreshing, but one must nevertheless ask whether the conceptual foundation on which his arguments rest is persuasive. As an initial matter, his rhetoric of "identity" suggests a major question about his normative vision of social movements. The one-dimensional identity that the law of equal protection and interest group politics imposes on "suspect" racial classes is deeply problematic for claims of distributive justice, as I have argued above.²⁶⁷ It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites. Second, Eskridge's failure to discuss the formation, organization, evolution, strategies and tactics of social movements simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms, and processes. Eskridge overlooks the interactive and temporal dimensions of a social movement's engagement with law; law envelops and defines the movements, in his telling. Most troubling, Eskridge's vision of "peaceable pluralism" is an impoverished and, in many respects, undesirable portrait of society and of social movement's role in the polity—a reaction that even he anticipates.²⁶⁸ In his view, human agency is excessively subservient to the dictates of law and order. This portrait bears little relation to the social history of the marginalized groups that Eskridge concedes have been so influential in shaping constitutional history. Nevertheless, Eskridge's vision probably does accurately describe how the Supreme Court has mediated democracy and social movements in recent history; thus, it helps to explain the fate of the *Grutter* intervenors' "mass movement."

In contrast to Eskridge's scholarship, Professor Reva Siegel's work on social movements questions the "juricentric . . . understanding of our constitutional tradition."²⁶⁹ In a recent work challenging Professor David Strauss's categorical claim that amendments are "irrelevan[t]" forms of constitutional change, Siegel demonstrates the centrality of "nonjuridical

266. Here Eskridge concedes the criticism of law that sociologists and critical legal theorists have leveled for some time. On law as a mechanism for maintaining social control and legitimating the status quo, see, for example, Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (1997); Talcott Parsons, *Law and Social Control*, in *Law and Sociology* 56 (William M. Evan ed., 1962); Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363 (1984) (describing rights as indeterminate, unstable, historically contingent, and subject to manipulation); Max Weber, *Economy and Law (Sociology of Law)*, in *2 Economy and Society* 641 (Guenther Roth & Clause Wittich eds., Ephraim Fischhoff et al. trans., 1978).

267. See *supra* Part I.D.

268. See Eskridge, *Channeling*, *supra* note 24, at 423 (noting that the Court's jurisprudence is "less defensible if one rejects the relevance of [his] pluralist premises for constitutional theory").

269. Siegel, *Text*, *supra* note 24, at 299.

speakers” to constitutional lawmaking.²⁷⁰ Noting that “constitutional theory rarely recognizes the role that social movements play in the construction of constitutional meaning,”²⁷¹ Siegel engages in a positive and normative project that contests this ahistorical tendency in constitutional scholarship. She argues that social movements should be studied to enhance understanding of how the “debates about the Constitution outside the courts shape constitutional understandings inside the courts.”²⁷² More particularly, Siegel is interested in showing how “mobilized groups of citizens, acting inside and outside the formal procedures of the legal system,” have used the text of the Constitution to claim full citizenship.²⁷³ With these goals as her starting points, Siegel contributes to constitutional scholarship touting the importance of “popular constitutionalism” in the face of the Rehnquist Court’s incursions into congressional prerogatives in the area of Section 5 legislation²⁷⁴ and, more generally, the concept of judicial supremacy.²⁷⁵

270. *Id.* at 299–300. Strauss’s claim is found in David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1459–60 (2001). Strauss privileges a profoundly juricentric “common law” approach to constitutional interpretation. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 879 (1996) (“The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.”).

271. Siegel, *Text*, *supra* note 24, at 300.

272. *Id.* at 303.

273. *Id.* at 299.

274. Siegel’s scholarship on this theme includes Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 524–25 (2000) (criticizing Rehnquist Court’s restrictive approach to Section 5 antidiscrimination legislation for its “refusal to entertain the possibility of systemic constitutional wrong”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L.J.* 1943, 1946–47 (2003) (attacking Rehnquist Court’s “enforcement model” view of separation of powers and proposing an alternative model granting equal constitutional interpretive authority to Congress and the Court for the purpose of Section 5 of the Fourteenth Amendment); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1, 3 (2003) (arguing that juricentric approach to the Constitution ignores “subtle but fundamental interconnections between the constitutional dimensions of our political life and the democratic dimensions of our constitutional culture”).

275. See generally Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Cal. L. Rev.* 1027 (2004) (arguing that popular constitutionalism and judicial supremacy are not mutually exclusive systems of legal ordering, but instead represent understandings and practices that dialectically structure the existing constitutional order). For other scholars’ views, see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *Cal. L. Rev.* 959, 1011 (2004) (arguing that “the choice between popular constitutionalism and judicial supremacy . . . is necessarily and unavoidably one for the American people to make”); *id.* at 980–83 (supporting Siegel’s framework of popular constitutionalism); see also Mark Tushnet, *Taking the Constitution Away from the Courts* 33–53, 154–94 (1999) (proposing populist approach to constitutional interpretation).

Siegel also demonstrates that historically marginalized groups have used the text of the Constitution as a site for contesting the meaning of citizenship. She uses the successful nineteenth-century struggle for ratification of the Nineteenth Amendment, conferring women suffrage, and the unsuccessful bid during the 1960s and 1970s for ratification of the Equal Rights Amendment to demonstrate the point.²⁷⁶ Siegel does not give primacy to either the courts or the legislature, but she notes that the women in these struggles sometimes worked “with the help of a responsive judiciary, and . . . sometimes by overcoming deeply entrenched resistance in the representative branches of government.”²⁷⁷ Siegel argues that the people’s interpretations of the Constitution are not to be ignored in deference to “the official pronouncements of judges”²⁷⁸ and lawmaking within the meaning of Article V’s prescriptions for formal amendment of the Constitution.²⁷⁹ She explains,

Because our constitutional culture addresses ordinary citizens as authors and imbues them with the expectation that official declarations of the law are semantically permeable, contestable, and revisable, official pronouncements about the meaning of the Constitution elicit special forms of engagement from citizens and so become a focal point of normative contestation.²⁸⁰

In Siegel’s conception, the relationship between social movements and the law is dynamic. Siegel builds a bridge between constitutional and social theory; she pushes the legal literature toward the understanding of social movements contained in the social science literature.

At the same time, the privileged position assigned to constitutional text in Siegel’s theory raises questions of context and degree. It is not that the text is without meaning. The claim that the contestation of constitutional meanings has been integral to social movements is undoubtedly accurate in Siegel’s history of the two American women’s movements. But as a generally applicable principle, the emphasis on text is problematic. Consider a comparison between the nineteenth- and twentieth-century feminist mobilizations in the United States, the subjects of Siegel’s analysis, and the abolitionist movement. Abolitionism spanned numerous locales (tracking the course of the Atlantic slave trade) and customarily is dated from 1831, when the first issue of the antislavery newspaper *The Liberator* was printed, to 1865, when the Thirteenth Amendment was enacted.²⁸¹ Constitutional text was much less relevant

276. Siegel, Text, *supra* note 24, at 328–44.

277. *Id.* at 344.

278. *Id.* at 299.

279. *Id.* at 299–302, 313–15; see also sources cited *supra* note 275.

280. Siegel, Text, *supra* note 24, at 322.

281. See Franklin & Moss, *supra* note 209, at 243–44 (discussing defeat of South and passage of the Thirteenth Amendment in 1865); Kraditor, *supra* note 106, at 3–4 (1989) (dating beginning of abolitionism to publication of William Lloyd Garrison’s antislavery tract in 1831 and noting that it was published through 1865).

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to the abolitionist struggle over time than to the American women's movements.

Since slaves were considered chattel and had no legal personhood,²⁸² the movement by the enslaved for citizenship rights, most famously demonstrated in *Dred Scott v. Sandford*,²⁸³ was but one piece of the American abolitionist movement. The violence of slave insurrections or threat of violent disorder—"the crushing arm of power," as the black abolitionist David Walker called it²⁸⁴—was a much more potent form of resistance for the enslaved.²⁸⁵ One need only think of the Nat Turner insurrection in Virginia in 1831²⁸⁶ or the Denmark Vesey uprising in South Carolina²⁸⁷ to demonstrate the point. And, of course, John Brown's violent resistance to slavery at Harper's Ferry, Virginia in 1859, together with his subsequent trial for treason and murder, and his execution, was a singular event in the history of the abolitionist struggle for freedom—a series of events that portended and hastened the start of the Civil War.²⁸⁸ Migration—or, more fittingly, escaping—to the upper South and North along the Underground Railroad, and immigration to countries of origin in Africa, constituted forms of resistance as well.²⁸⁹

It is also vitally important to bear in mind that religious belief and teachings in the oral tradition, as well as religious texts, were the predicate for abolitionist rhetoric and slave resistance—a far more plausible source of inspiration than the American Constitution.²⁹⁰ As the historian Paul Escott has explained, "Armed with their religion, the slaves estab-

282. See Lawrence M. Friedman, *A History of American Law* 219–29 (2d ed. 1985) (noting that "[t]he case reports of slave states are full of wrangles about sales, gifts, mortgages, and bequests of slaves" and that the legal status of slaves was "halfway between land and personalty, in regard to creditors rights").

283. 60 U.S. 393 (1857); see also Don E. Fehrenbacher, *The Dred Scott Case* 160–62, 278–79, 287, 341–42 (1978) (discussing attempts to abolish Fugitive Slave Law through both legislation and litigation).

284. See Benjamin Quarles, *Black Abolitionists* 16–17 (1969) (discussing Walker's Appeal and how it led to passage of laws in Georgia and North Carolina against "incendiary publications").

285. See Herbert Aptheker, *American Negro Slave Revolts* *passim* (1943) (discussing "widespread fear of servile rebellion" among whites during slavery era).

286. See Quarles, *supra* note 284, at 17–18 (discussing Turner); Gayraud S. Wilmore, *Black Religion and Black Radicalism* 87–98 (1998) (same).

287. See Franklin & Moss, *supra* note 209, at 164 (discussing Vesey).

288. See Steven Lubet, *John Brown's Trial*, 52 Ala. L. Rev. 425, 425–27 (2001) (describing John Brown's raid and trial as critical event in history of abolitionism and calling his trial "characterized by jurisdictional blunders, professional misconduct, conflicts of interest, and outright lying" and the "most important" in "United States history" because of its impact on Northern public opinion).

289. See Quarles, *supra* note 284, at 3–17.

290. See Paul D. Escott, *Slavery Remembered* 110–11 (1979) ("The centerpiece of black culture that the slaves developed was religion."); Quarles, *supra* note 284, at 68–89 (documenting relationship between congregations and abolitionist movement); Wilmore, *supra* note 286, at 57–59, 121–24 (discussing connection between black churches and abolitionism).

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lished a set of ethics and a view of the universe that gave them spiritual independence from White oppression. . . . Obviously, God's law would not sanction the injustice that took place on man's earth."²⁹¹ Consider the religious commitment of the black abolitionist Frederick Douglass²⁹² and the religious fervor evident in slave testimonials²⁹³ as examples of the ethical understandings that animated abolitionism. Consider also the religious inspiration of slave insurrections, most famously, Nat Turner's.²⁹⁴ Or consider the transcendentalism that motivated William Lloyd Garrison, who denied the legitimacy of a government comprised of slaveholders,²⁹⁵ or Ralph Waldo Emerson,²⁹⁶ or Henry David Thoreau.²⁹⁷ The claim that religious text and belief were a greater source of inspiration for the black freedom struggle than the Constitution can also be made for the African American struggle after the enactment of the Reconstruction Amendments and through the twentieth century. If one situates the civil rights struggle around the leadership and liberation theology of Reverend Martin Luther King, Jr., the primacy of religious texts, beliefs, and authority is inescapable.²⁹⁸ Constitutional text obtains a privileged position only if one superimposes the NAACP's liberal legalist worldview onto

291. Escott, *supra* note 290, at 111–12.

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292. See, e.g., Frederick Douglass, *My Bondage and My Freedom* 104–08 (William C. Andrews ed., U. of Ill. Press 1987) (1855) (describing religious awakening that preceded his abolitionist activism). Douglass also famously defended the Constitution as an antislavery document. See Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), reprinted in 2 *The Life and Writings of Frederick Douglass* 467–80 (Philip S. Foner ed., 1950).

293. See Escott, *supra* note 290, at 110–17 (describing evidence in slave testimonials of how “religion . . . nourished the slaves”); *The Classic Slave Narratives passim* (Henry Louis Gates ed., 2002) (demonstrating importance of religious belief to slaves); Cheryl J. Sanders, *Liberation Ethics in the Ex-Slave Interviews*, in *Cut Loose Your Stammering Tongue: Black Theology in the Slave Narrative* 73, 73–96 (Dwight N. Hopkins & George C. L. Cummings eds., 2003) (discussing ethical perspectives of ex-slaves as related to Christianity, including liberation ethos).

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294. See Quarles, *supra* note 284, at 17–18 (discussing Turner's religious faith); Wilmore, *supra* note 286, at 69–74 (1998) (noting that slaves “called up all of the resources of their religion to express and activate the spirit of resistance”).

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295. See Kraditor, *supra* note 106, at 78–140 (1989) (tracing Garrison's belief in necessity of immediate emancipation to his transcendentalist views).

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296. See *id.* at 13–15 (noting that Emerson's “transcendentalists, it appears, were both logical models for and contemporaries of the abolitionists”).

297. See *id.* at 24.

298. See Adam Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* 13–18 (1987) (discussing roots in church of SCLC); David J. Garrow, *Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference* 42–43 (1999) (discussing roots of King's religious beliefs); Martin Luther King, Jr., *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* x–xv (James M. Washington ed., 1986) (noting King's roots in “religion of his black slave forbears” and central role of religion in his leadership strategy); *id.* at 10–20, 85–90 (King discussing Christian basis of nonviolent activism for social justice).

the entire African American freedom struggle, as if it were a transhistorical phenomenon, which, of course, it was not.

Overall, the centrality of constitutional text in Siegel's conception of social movements' claims for justice legitimizes and attributes too much influence to the Constitution, a document whose inspirational capacity in the everyday lives of slaves was limited, in comparison to other sources. Siegel's theory contributes to an overly legalistic, if not juricentric, conception of the goals of social protest. To that extent, law is overdetermined in Siegel's otherwise appealing theory of social movements.

B. *Legal Mobilization Literature*

Mobilization theory must be understood in connection to scholarship that doubts the capacity of courts to produce fundamental change. Professor Gerald Rosenberg's work is a paradigm for this approach. In *The Hollow Hope*, Rosenberg concluded that "U.S. courts can almost never be effective producers of significant social reform."²⁹⁹ Rosenberg's determination rested on three observations. First, he argued that the negative conception of rights that characterizes equal protection jurisprudence limits the ability of courts to articulate rules mandating fundamental, affirmative change.³⁰⁰ Second, Rosenberg noted that, in any event, courts are unable to ensure that politicians and administrators implement constitutional norms that might reorder society.³⁰¹ Third, he acknowledged that litigation might indirectly aid struggles for change by, for example, influencing public opinion or mobilizing the marginalized, but he dismissed the idea that it produces significant extrajudicial effects.³⁰²

Legal historians writing in the critical tradition have significantly strengthened this view. Two works are particularly valuable additions to the literature. Professor Michael Klarman's scholarship on race relations from *Plessy v. Ferguson* to *Brown v. Board of Education* has substantiated the claim that law is unlikely, alone, to directly produce significant change.³⁰³ But Klarman has moved beyond the singular focus on the courts that characterized Rosenberg's study. He has demonstrated that a broad array of political, social, and economic factors and a complex relationship between the black protest movement and white resistance to *Brown* explains the Court's shift from endorsing de jure segregation to sanctioning for-

299. See Rosenberg, *supra* note 27, at 338.

300. See *id.* at 10–21, 336–43.

301. See *id.*

302. See *id.* at 338 (calling claim of important extra-judicial effects "dubious" due to lack of empirical evidence supporting it).

303. See Klarman, *Backlash*, *supra* note 27, at 85 (arguing that indirect effects of *Brown* far outweighed the direct impact the decision had on school desegregation). See generally Klarman, Jim Crow, *supra* note 27 (providing narrative history of race relations and civil rights movement from *Plessy* to *Brown*); Klarman, *Racial Change*, *supra* note 123 (providing history of race relations from World War II through early years after *Brown*).

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mal equality.³⁰⁴ Professor Mary Dudziak has also strengthened the critical view of the causal relationship between civil rights litigation and social change by discussing the role of international politics in race relations history. She has demonstrated that the Cold War significantly influenced both the shift of the executive branch from neglect to responsiveness on the civil rights issue and the Supreme Court's endorsement of formal equality in *Brown*.³⁰⁵

The critical view has met with resistance in the scholarly community,³⁰⁶ however, including among legal mobilization theorists. These scholars are skeptical of the critics' claims that law is unlikely to produce fundamental change.³⁰⁷ Critics advancing a "legal mobilization" theory urge scholars to focus more closely on precisely what counsel and client communities hope to achieve through litigation and on how they deploy legal discourse to their advantage—despite its limitations.³⁰⁸ Mobiliza-

304. See Klarman, Jim Crow, *supra* note 27, at 443–68 (arguing that “changes in the social and political context of race relations preceded and accounted for changes in judicial decision making”); Klarman, Racial Change, *supra* note 123, at 13–14 (arguing that “[t]he reason the Supreme Court could unanimously invalidate public school segregation in 1954 . . . was that deep-seated social, political, and economic forces had already begun to undermine traditional American racial attitudes”).

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305. See Dudziak, Cold War, *supra* note 89, at 18–46, 79–114, 203–48 (describing relationship between Cold War and domestic civil rights reforms). Dudziak has not explicitly aligned herself with the critical scholarship; that she is an important part of it is my interpretation.

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306. See, e.g., David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 Va. L. Rev. 151, 151–58 (1994) [hereinafter Garrow, History] (echoing Tushnet's argument but giving greater weight to *Brown*'s direct impact on race relations); Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 Law & Hist. Rev. 59, 59–62 (1991) (arguing that federal courts played a controlling role in integrating the bus system in Montgomery); Charles V. Hamilton, *Federal Law and the Courts in the Civil Rights Movement*, in *The Civil Rights Movement in America* 97, 97–99 (Charles W. Eagles ed., 1986) (arguing that legislation and judicial decisions were crucial components of successful campaign to end de jure segregation); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 Va. L. Rev. 173, 173–74 (1994) [hereinafter Tushnet, Significance] (arguing that *Brown* was more important in transformation of race relations than Professor Klarman contends); see also Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* 301–12 (1992) (arguing that lawyers' arguments in abortion and death penalty cases brought about swift, dramatic change); Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 710 (1976) (crediting Chief Justice Warren, in particular, with fundamentally reshaping American values by way of *Brown*).

307. Some of the works comprising the critical view were written after mobilization theory got its start; as an ongoing area of scholarly analysis, mobilization theory continues to be responsive to such works in the critical canon.

308. See McCann, Rights, *supra* note 26, at 1–12 (using pay equity cases to propose a bottom-up jurisprudence and legal mobilization model of how legal discourses, symbols, and procedures can aid social movements); Michael W. McCann, *Reform Litigation on Trial*, 17 Law & Soc. Inquiry 715, 728 (1992) [hereinafter McCann, Reform Litigation] (arguing that Rosenberg inadequately explored the nature and meaning of law's indirect effects on social movements and thereby undervalued the movement's other potential

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tion scholars emphasize law's politically "mobilizing" effect.³⁰⁹ In their view, Rosenberg's negative assessment of law's ability to produce change is excessively pessimistic. According to mobilization scholars, Rosenberg's unjustified pessimism can be traced to flawed methodology. Rosenberg was hamstrung by a narrow, institutional focus. He measured success in terms of direct consequences of legal campaigns—whether lawyers win their cases and whether court victories translate into policy changes with nationwide impact.³¹⁰

Legal mobilization theorists argue that top-down scholarship such as Rosenberg's, though vitally important, misses the politically sophisticated stratagems that lawyers bring to their legal campaigns.³¹¹ Of course, litigators want to win their cases, but they do not view litigation as a "zero-sum" game.³¹² These lawyers define success more broadly, in terms that cannot be captured easily, if at all, by statistical data gleaned from conventional sources such as media reports and surveys of public opinion.³¹³ They seek to generate and leverage the beneficial, indirect³¹⁴ or "radiating"³¹⁵ effects that they presume flow from change-oriented litigation campaigns.³¹⁶ Thus, for mobilization theorists, litigation can be indi-

purposes); Michael McCann & Helena Silverstein, Rethinking Law's "Allurements," *in* Cause Lawyering 261, 261–92 (Austin Sarat & Stuart Scheingold eds., 1998) (arguing that pessimistic assessments of law's potential to affect social change and generalizations about cause lawyers are overly broad and inadequately substantiated); Jonathan Simon, The Long Walk Home to Politics, 26 Law & Soc'y Rev. 923, 938–40 (1992) (arguing that Rosenberg insufficiently explored structures, ideologies, and agendas that influence judicial interpretation); see also Scheingold, *supra* note 27, at 131–42 (arguing that attorneys can play a vital role in leading clients to "believe that they have rights"); Marc Galanter, The Radiating Effects of Courts, *in* Empirical Theories About Courts 117, 117–42 (Keith O. Boyum & Lynn Mather eds., 1983) [hereinafter Galanter, Radiating Effects] (arguing that understanding law's value to social reform movements lies in understanding it as a system of "cultural and symbolic meanings" rather than as a "set of operative controls"); McMahon & Paris, *supra* note 26, at 63–134 (arguing in favor of McCann's description of law's role in social movements over that of Rosenberg).

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309. See generally McCann, Reform Litigation, *supra* note 308.

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310. See Rosenberg, *supra* note 27, at 4.

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311. On cause lawyering, see Carrie Menkel-Meadow, The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, *in* Cause Lawyering, *supra* note 308, at 31.

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312. See, e.g., Galanter, Radiating Effects, *supra* note 308, at 125–27; McCann, Reform Litigation, *supra* note 308, at 727–29.

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313. See McCann, Reform Litigation, *supra* note 308, at 732, 736, 741–42 (describing other measures of success, such as instilling hope in movement participants and increasing pressure for social change, and stating that "many important changes in social relations are missed by policy-centered studies").

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314. See *id.* at 732–33 (explaining that indirect effects of judicial decisions—including how individuals "reconstruct legal norms into resources for purposes quite unintended by judicial officials"—are much more significant in social movements).

315. See Galanter, Radiating Effects, *supra* note 308, at 118–21 (describing "flow of influence outward from the courts to the wider world of disputing and regulating" and "incommensurability of law in action with law on the books").

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316. As an example, according to Doug McAdam the increasing responsiveness of the Supreme Court and federal policymakers to African Americans from the 1930s through

rectly efficacious even if claims never reach the trial stage or lawyers do not prevail in the courts or on appeal.³¹⁷

Under this view, law is deployed as a tactic for altering perceptions and raising expectations about the prospects for change within client communities.³¹⁸ It creates “opportunity structures” and “discursive frameworks”³¹⁹ that can be exploited by the socially marginalized.³²⁰ Lawyers can mobilize communities by “enhancing” a “sense of efficacy”; providing “organizing skills and resources” and “symbols for rallying a group”; “broadcasting awareness of grievance”; “dramatizing challenge to the status quo”; helping laypeople “take themselves seriously” and “believe . . . in its capabilities”; “lend[ing] an air of importance and legitimacy to what is often a meager group of citizens with very little political experience”; putting at the community’s disposal “litigation and its credible promise of tangible and proximate results in the form of courtroom victories”; and “counsel[ing] organizational leaders on how to behave so as to maximize” the chances of a legal victory.³²¹ In short, legal mobilization is conceived as a “social movement tactic”³²² in and of itself, or as a crucial element in “movement building”³²³ that helps lay citizens make “tactical judgments.”³²⁴ Lawyers facilitate rather than dominate or fragment movement activity³²⁵ because they have developed “flexible lawyer-

the 1950s resulted in a “cognitive revolution” among blacks. See Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970*, at 108 (1982) [hereinafter McAdam, *Political Process*].

317. See McCann, *Reform Litigation*, supra note 308, at 738–39 (explaining how pending litigation and even “verbal threats of a lawsuit” could break “negotiating deadlocks”).

318. Galanter, *Radiating Effects*, supra note 308, at 125–26 (describing law’s “mobilizational or demobilizational effects” achieved through “transmission and reception of information”).

319. McCann, *Reform Litigation*, supra note 308, at 733; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 310 (1990) (discussing how legal rights become “possessions of the dispossessed”).

320. Some scholars of the civil rights movement likewise emphasize law’s symbolic effects on society and client communities. See, e.g., Garrow, *History*, supra note 306 (arguing that revisionists underestimate *Brown*’s contribution to the black protest movement); Tushnet, *Significance*, supra note 306 (conceding that *Brown* failed to integrate schools but arguing that its nondiscrimination principle had a moral and juris-generative impact).

321. Galanter, *Radiating Effects*, supra note 308, at 125–26; Scheingold, supra note 27, at 139, 141.

322. See Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 Am. J. Soc. 1201, 1201 (1991) [hereinafter Burstein, *Mobilization*] (noting that litigation in federal courts is seldom formally analyzed “as a social movement tactic” and offering such an analysis).

323. McCann, *Reform Litigation*, supra note 308, at 735.

324. *Id.* at 732.

325. McCann & Silverstein, supra note 308, at 269–76 (analyzing two studies of lawyers engaged in social movements and finding that these lawyers neither “contribute[d] to the fragmentation” of these movements nor “dominate[d] movements or clients”). The vast majority of scholars who write about public interest litigation have adopted an

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ing” techniques that make them capable of engaging in political action and working with nonlawyers.³²⁶

The legal mobilization literature is not juricentric in the manner of Eskridge, and its claims about constitutional text are more skeptical than Siegel’s. But legal mobilization theory shares the central defect that I have identified in the constitutional literature on social movements—law is overdetermined and insufficiently contextualized. As a result, these theorists overstate the usefulness of litigation, or its threat, in mobilizing communities. Certainly, litigation can have a positive impact on the political consciousness of some client communities, as the critical literature concedes.³²⁷ The mobilization theorists’ general proposition is overdrawn, however. Their insistence that law can be “leveraged” to achieve substantial, indirectly positive results for marginalized groups is unpersuasive as a meta-theory of law’s utility in social change efforts.

C. *Distinguishing Law from Social Movements*

Legal theorists’ confidence in the compatibility of law and political struggles for change, including identity-based movements, flows, I propose, from their tendency to characterize social movements in ways that deny their distinctive features. Those who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with “social movements.” Notably, the tendency for the legal literature to draw little distinction between law reform campaigns seeking to mobilize communities and the concept of a “social movement” is deeply rooted. Professor Joel Handler, one of the first legal scholars to examine the public interest litigation of the 1960s, declared years ago that the “use of litigation as an instrument of social reform [has] become so widespread that it can be called a movement.”³²⁸ Contemporary constitutional and legal mobilization theories perpetuate

analytical framework that writes out the tension between law and movement activity. As I discuss *infra* notes 435–437, this framework best applies where lawyers adopt a radically client-centered approach or do not work as practitioners.

326. McCann & Silverstein, *supra* note 308, at 276.

327. See Rosenberg, *supra* note 27, at 336–43. In an important innovation, Klarman accepts the view that litigation can have important, indirect effects on society. But he rejects the assumption that such effects necessarily are positive or substantial enough to ascribe tremendous utility to litigation as a tool for achieving change. Klarman, Jim Crow, *supra* note 27, at 363–76; *id.* at 377–85 (arguing that *Brown* likely undercut civil rights movement’s use of direct action tactics); *id.* at 385–442 (arguing that *Brown* radicalized white southern politics and precipitated violent massive resistance).

328. Joel F. Handler, *Social Movements and The Legal System: A Theory of Law Reform and Social Change* (1978) (examining attempts of social movements to use court action to achieve concrete changes); see also Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976) (discussing reaction of elite lawyers to social forces in twentieth-century America such as industrialism, urbanization, immigration, war, economic depression, and social ferment).

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the idea that law is compatible with and immensely efficacious for a social movement.³²⁹

In ascribing such vast capacities to lawyers or constitutional text as mobilizing agents, or assigning judges the role of “necessary safety valve” “channeling” movements in “assimilative directions,” legal scholarship overlooks the characteristics of social movements that make them unique. These scholars minimize the differences between the form and substance of legal processes and concepts, and the form and purposes of participatory democratic action. In fact, there are profound differences between most forms and tactics of lawyering and social movement activity.³³⁰ Each of the theories discussed in the preceding section diminishes the basic tension between law and social movements, but Eskridge’s approach is the most problematic. His overgeneralized perspective on protest movements is premised on the normative judgment that social movements and the legal order should work, more or less, in sync.

In this subpart I discuss why this kind of privileging of law inverts and distorts social movement theory, which, as set forth in the social sciences, offers a more coherent view of the interrelationship between social movements and the law. Aspects of nineteenth- and twentieth-century social movement history lend support to the social movement theory found in the social science literature. Ultimately, I posit a normative vision in which social movements preserve their own social and political identities and spaces; movements approach law and lawyers deliberately and strategically, if at all. This is the best way for the two forms of political action to coexist or collaborate successfully. By design and character, I argue, social movements are more likely to achieve their goals when they are free from the constraints imposed by law and lawyers—even politically astute ones like the counsel for the *Grutter* intervenors.

Attaching concrete meaning to the term “social movement” illuminates the distinction that I offer between social movements as agents of “peaceable pluralism” and progressive social movements that seek political agency outside of the law. In using the term “social movement,”³³¹ I

329. See Scheingold, *supra* note 27, at 138–40 (describing useful role of lawyers in organizing political movements).

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330. Some mobilization scholars note the historical tension between cause lawyers and social movements, although this fact does not figure much in their analyses. See Scheingold, *supra* note 27, at 141–42; McCann, *Reform Litigation*, *supra* note 308, at 736; McCann & Silverstein, *supra* note 308, at 272.

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331. The definition of social movements I offer here is intended to help frame the debate about the relationship between social movements and the law. While it is conceivable that other legal scholars may not embrace every aspect of my attempt, I do think that the baseline definition set forth here is generally accepted across a number of disciplines that use the American civil rights and women’s movements of the 1960s and 1970s as paradigms of analysis. See, e.g., sources cited *infra* notes 334–341, 343. That said, I welcome further efforts by scholars of law and social movements to clarify what constitutes a social movement.

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mean to suggest a set of characteristics and activities *typically*³³² associated with and flowing from participatory democratic action.³³³ Participants in social movements engage in a sustained, interactive campaign that makes sustained, collective claims for relief or *redistribution* in response to social marginalization, dislocation, change, or crisis.³³⁴ The hallmark of such participatory democratic action is the effort by citizens to *directly* influence public policy by appealing *directly* to the public and a target audience of decisionmakers, such as governmental representatives.³³⁵ These movements, then, pursue their particular conception of justice against the backdrop of an unresponsive polity.³³⁶ Participatory democracy thus

332. It is important to underscore that my description of social movements is not meant to liken them to elements of a legal claim, where the phenomena cannot be a social movement if one factor is missing. Instead, I mean to describe a set of typical characteristics and to distinguish characteristics and activities usually associated with social movements and those typically associated with law in the courts.

333. As explained in a seminal text,

Participatory democracy assumes that in a good society people participate fully, and that a society cannot be good unless that happens. Participation and control must be one. Furthermore, the democratic process of participation and control must be used in the movement for social change from the start; thus the means employed for change must be democratic. . . . [A] politics of creative disorder is indicated, at once oriented to unveiling the inequities of the present, and to building a counter-system that is participatory from the ground up. New, participatory institutions must be built in all social spheres and, as they develop, will claim legitimacy and recognition as being genuinely democratic and accountable to their constituencies.

C. George Benello & Dimitrios Roussopoulos, Introduction to *The Case for Participatory Democracy: Some Prospects for a Radical Society* 6 (C. George Benello & Dimitrios Roussopoulos eds., 1971).

334. See Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 7–14 (1977) (describing conditions that give rise to social movements); Charles Tilly, *Social Movements 1768–2004*, at 3–4, 12–14 (2004) [hereinafter Tilly, *Social Movements*] (describing characteristics of social movements); Paul Burstein, *Social Movements and Public Policy*, in *How Social Movements Matter* 3, 7–8 (Marco Guigni et al. eds., 1999) [hereinafter Burstein, *Social Movements*] (same); Jo Freeman, *On the Origins of Social Movements*, in *Waves of Protest* 7, 21–22 (Jo Freeman & Victoria Johnson eds., 1999) (discussing role of crises in initiating action of social movements); John D. McCarthy & Mayer N. Zald, *Social Movement Organizations*, in *The Social Movements Reader* 169, 169–86 (Jeff Goodwin & James M. Jasper eds., 2003) (describing resource mobilization theory approach as “deal[ing] in general terms with the dynamics and tactics of social movement, growth, decline, and change”).

335. See Tilly, *Social Movements*, *supra* note 334, at 3–4 (characterizing social movements as “making collective claims on target authorities”); Charles Tilly, *From Interactions to Outcomes in Social Movements*, in *How Social Movements Matter*, *supra* note 334, at 253, 260–68 [hereinafter Tilly, *Interactions*] (defining a social movement as “a sustained challenge to power holders in the name of a population living under the jurisdiction of those power holders by means of repeated public displays of that population’s worthiness, unity, numbers, and commitment”).

336. See Tilly, *Social Movements*, *supra* note 334, at 3–4 (describing social movements as a “counterweight to oppressive power”); Jeff Goodwin & James M. Jasper, *Editor’s Introduction to The Social Movements Reader*, *supra* note 334, at 3–4 (discussing causes, means, and aims of social movements).

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functions quite differently from indirect or representative democracy, in which citizen preference is subsumed within the organizational structures and strategic apparatus of political parties and interest groups.³³⁷ Instead, citizens seek influence through political activism that occurs outside of such structures, and they practice a “contentious politics,” as Professor Charles Tilly, a leading theoretician of social movements, has explained.³³⁸ Social movements support their policy preferences through strategies, such as the use of moral arguments, that typically would not arise in institutionalized settings.³³⁹

Social movement activity is characterized by organization, cohesion, and agenda setting.³⁴⁰ A social movement typically includes groups of people who, meeting in a safe social space, come together to caucus, and collaborate over a common grievance.³⁴¹ The members of the collective develop a plan of action, or devise strategies and tactics, for achieving their goals.³⁴² They commonly use direct action, such as demonstrations, marches, or sit-ins; community organizing, which typically includes community education or “consciousness-raising” sessions; and petitioning and pamphleteering to achieve the movement’s goals.³⁴³ There is an express

337. See Piven & Cloward, *supra* note 334, at 5 (distinguishing social movement from social movement organizations and discussing how formal structures undermine protest); Burstein, *Social Movements*, *supra* note 334, at 7–9 (distinguishing “unstructured performances” of social movement by those on margins of society from well-funded, well-organized, and well-institutionalized activities of interest groups).

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338. Tilly, *Social Movements*, *supra* note 334, at 3–4; see also Goodwin & Jasper, *supra* note 336, at 3–4 (“Social movements are conscious, concerted, and sustained efforts by ordinary people to change some aspect of their society by using extra-institutional means. . . . They are protesting against something.”).

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339. See Piven & Cloward, *supra* note 334, at 12 (describing perception among protestors that social arrangements are “wrong” and “unjust”); John C. Green, *The Spirit Willing: Collective Identity and the Development of the Christian Right*, in *Waves of Protest*, *supra* note 334, at 153, 156–59 (discussing use of “moral majority” concept by Christian Right).

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340. See Piven & Cloward, *supra* note 334, at 4–5 (describing, but rejecting, dominant view that organization is critical to definition of social movement); Introduction to *Waves of Protest*, *supra* note 334, at 1, 1–3 (describing characteristics often perceived as being definitional of social movements).

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341. See William H. Chafe, *Women and Equality: Changing Patterns in American Culture* 81–113 (1977) [hereinafter Chafe, *Women and Equality*] (discussing creation of change through use of social spaces); Freeman, *supra* note 334, at 9–12 (discussing role of church and colleges in fostering civil rights movement).

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342. See, e.g., Aldon D. Morris, *Origins of the Civil Rights Movement: Black Communities Organizing for Change* 275–90 [hereinafter Morris, *Origins*] (using classical collective behavior theory, Weber’s theory of charismatic movements, and the resource mobilization theory to analyze civil rights activism as a social movement); Gary Alan Fine, *Public Narration and Group Culture: Discerning Discourse in Social Movements*, in *Social Movements and Culture* 127–43 (Hank Johnston & Bert Klandermans eds., 1995) (describing social movement as a “staging area” for action with distinct cultures, rituals, and narratives).

343. See Jervis Anderson, Bayard Rustin: *Troubles I’ve Seen: A Biography* 239–64 (1997) (discussing planning and implementation of 1963 March on Washington); Alice Echols, *Daring to Be Bad: Radical Feminism in America 1967–1975*, at 10, 83–90, 140

role for emotion in social movements because breaking mental chains of oppression, creating new forms of cultural expression, and awakening participants from quiescence are fundamental to the initiation, growth, and development of a movement.³⁴⁴ Public performance of the cognitively liberated self and displays of unity are integral to sustaining movement cohesion and gaining the public's attention.³⁴⁵ The key factor uniting these tactics is that they are protest-oriented and disruptive of the normal course of politics. In fact, although the civil rights movement, the paradigm social movement in this country, was nonviolent, some social movement theorists argue that violence is highly correlated with movement success.³⁴⁶ On the other end of the spectrum, social movements also engage in activities that look more like interest group behavior—lobbying external sources of support and strategically using the media, for example.³⁴⁷ Despite planning, social movements retain fluidity and an improvisational quality because of their informal nature.³⁴⁸ They must retain the ability to change course and tactics quickly because they must respond to the changing political environment if they are to sustain

(1989) (discussing consciousness raising in the women's movement); Doug McAdam, *Freedom Summer* 35–160 (1988) (discussing 1964 voting rights campaign in Mississippi by student volunteers, mostly white); Morris, *Origins*, supra note 342, at 229–74 (discussing elements of civil rights movement, including “freedom rides,” citizenship schools, Birmingham campaign, media strategy, and other nonviolent tactics); Tilly, *Interactions*, supra note 335, at 260–62, 267 (discussing social science approach to social movements based on an understanding of strength as a function of worthiness, unity, numbers, and commitment).

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344. See Piven & Cloward, supra note 334, at 10–11 (discussing role of frustration and anger in igniting social movement); Freeman, supra note 334, at 21–22 (discussing discontent); James M. Jasper, *The Emotions of Protest*, in *The Social Movements Reader*, supra note 334, at 153, 153–62 (discussing role of frustration, anger, alienation, anomie, and breakdown of social structures in igniting collective behavior).

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345. See Tilly, *Social Movements*, supra note 334, at 4 (describing social movement repertoire including displays of numbers, worthiness, unity, and commitment).

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346. See Gamson, supra note 147, at 79–82 (noting that protesters who use violence “have a higher-than-average success rate” in comparison with those who use nonviolent strategies); Marco Giugni, *How Social Movements Matter: Past Research, Present Problems, Future Developments*, Introduction to *How Social Movements Matter*, supra note 334, at xiii, xvi–xxiii (discussing militant action and concluding that “[t]he effectiveness of disruptive tactics and violence is likely to vary according to the circumstance under which they are adopted by social movements”); Piven & Cloward, supra note 334, at 14–23 (arguing that “[m]ass violence is . . . one of many forms of defiance” but noting that lower-class protesters “are usually not violent simply because the risks are too great; the penalties attached to the use of violence . . . are too . . . overwhelming”). See generally Saul D. Alinsky, *Protest Tactics*, in *The Social Movements Reader*, supra note 334, at 225 (offering general account of tactics in social movements).

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347. See supra note 343 and accompanying text.

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348. See Introduction to *Waves of Protest*, supra note 340, at 1, 1–2 [hereinafter Freeman, Introduction] (arguing that “[s]pontaneity and structure are the most important elements” of a social movement); see also Charles Tilly, *Social Movements and National Politics*, in *Statemaking and Social Movements* 297, 303–05 (Charles Bright & Susan Harding eds., 1984) [hereinafter Tilly, *Movements and Politics*] (describing variation in structure of different social movements).

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themselves and achieve and implement their goals.³⁴⁹ As historian Jo Freeman has maintained, “It is the tension between spontaneity and structure that gives a social movement its peculiar flavor.”³⁵⁰

Members of progressive social movements typically participate in the decisionmaking process on equal footing, although they may choose leaders or spokespersons to act on behalf of the group.³⁵¹ “[M]ost movements are not subject to hierarchical control,” Freeman explains, because hierarchy and the structure that it implies can undermine the egalitarian ethos that animates social movements.³⁵² For instance, during second-wave feminism, some women believed that “everyone should participate in the decisions that affected her life, and that everyone’s contribution was equally valid” because “participatory democracy, equality, liberty, and community” dictated these values.³⁵³ Moreover, a hierarchical structure can undermine movement goals such as mobilizing and organizing communities to challenge authority.³⁵⁴ This is true in part because the constituency typically involves “ordinary people as opposed to army officers, politicians, or economic elites.”³⁵⁵ These are people on society’s margins—for instance, poor people with little formal education—for whom the domination and status differentiation associated with hierarchy would be counterproductive.³⁵⁶ Or the constituency might simply lack the social and intellectual capital, and thus the confidence, of people in dominant positions in society, as was true of many women at the beginning of

349. See McAdam, *Political Process*, supra note 316, at 40–43 (describing how “[t]he opportunities for a challenger to engage in successful collective action do vary greatly over time”); Tilly, *Social Movements*, supra note 334, at 11–14 (discussing social movements as “interactive campaigns” and the importance of “political entrepreneurs”); Aldon Morris, *Tactical Innovation in the Civil Rights Movement*, in *The Social Movements Reader*, supra note 334, at 229, 229–33 [hereinafter Morris, *Innovation*] (noting importance of local movement centers for organizing 1960s protests).

350. Introduction to *Waves of Protest*, supra note 340, at 1–2.

351. See *id.* at 1–2; see also Jo Freeman, *A Model for Analyzing the Strategic Options of Social Movement Organizations*, in *Waves of Protest*, supra note 334, at 221, 221 [hereinafter Freeman, *Model*].

352. Freeman, *Model*, supra note 351, at 221.

353. *Id.* at 228.

354. See Charles M. Payne, *I’ve Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle 180–81* (1995) (discussing “redefinition of leadership” from experts to everyday people in civil rights struggle and how traditional leaders were “forced . . . to become more radical”).

355. Goodwin & Jasper, supra note 336, at 3.

356. On the marginality of movement participants and movement action, see Payne, supra note 354, at 180–206; Piven & Cloward, supra note 334, at 1–40 (discussing welfare recipients, southern black civil rights activists, and laborers); Tilly, *Social Movements*, supra note 334, at 1–15 (discussing social movements among poor and politically marginal or outgroups throughout the world); J. Craig Jenkins, *The Transformation of a Constituency into a Social Movement Revisited*, in *Waves of Protest*, supra note 334, at 277, 277–81, 286–89 (discussing structural powerlessness and problems of mobilization of farmworkers).

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the second wave feminist movement.³⁵⁷ Either case suggests why elite and/or professional involvement in social movements is fraught with difficulty: Professionals are accustomed to hierarchy, expect to occupy leadership roles, and expect to utilize their expertise; their perspectives can clash with those of lower-status participants in a social movement.³⁵⁸ Consider, for example, the conflict that beset the civil rights movement in Mississippi in 1965. Professor Chana Kai Lee, biographer of Fannie Lou Hamer, the local activist from a sharecropping family who was a leader in the struggle for voting rights, explains:

On one side were . . . poor, local Mississippi activists . . . and on the other were national NAACP officials who were financially and educationally middle class and had a reputation for being condescending toward the black poor. Local . . . activists wanted to identify their own problems and determine their own solutions without much input from middle-class people. . . . On the other hand, NAACP activists in the state branch and national office had serious questions about the effectiveness of the “localist” strategy. Doubt centered around capability and experience, and sometimes it surfaced in insulting public statements made by national officials.³⁵⁹

If a movement is to thrive, it is imperative to bridge this cultural divide and ensure that the expertise and prerogatives of higher-status leaders do

357. See Freeman, Model, *supra* note 351, at 228–30 (stating that early participants in the younger branch of the second wave of the feminist movement “had little experience in democratic organizations”). Freeman, however, acknowledges that members of the older branch did have “political experience in party politics, various bureaucracies, and the civil rights, and labor movement.” *Id.* at 229.

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358. See Doug McAdam, *The Decline of the Civil Rights Movement*, in *Waves of Protest*, *supra* note 334, at 325, 325–26 (describing oligarchization theory that ties decline of social movements to “the emergence of an elite that comes to exercise disproportionate control over the movement organization,” displaces “original goals with more conservative ones,” and leads to a “diminution in radicalism”); *id.* at 326 (describing institutionalization theory that ties decline of social movements to “the development of a hierarchical organization, an explicit division of labor, and established administrative procedures” that “dampen member enthusiasm and creativity in favor of predictability and organizational stability”); Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, in *Waves of Protest*, *supra* note 334, at 99, 106–14 (discussing conflicts between movement entrepreneurs and professional managers who “are interested in using and developing organizing skills and expanding the [social movement organizations] they lead because this is what they do for a career”); see also Payne, *supra* note 354, at 341–42 (noting a “different breed” of “urban, educated, and affluent” blacks whose agenda differed from that of earlier group and who had “little contact with the black masses, for whom they professed to speak” (citing John Dittmer, *The Politics of the Mississippi Movement*, in *The Civil Rights Movement in America*, *supra* note 306, at 65, 92)).

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359. See Chana Kai Lee, *For Freedom’s Sake: The Life of Fannie Lou Hamer* 114–15 (1999) (describing woman from abjectly poor sharecropping family who was an unlikely but highly effective leader of Mississippi Delta voting rights movement); *id.* at 116 (noting memo from National NAACP official stating that “local people in Miss. needed someone to think for them”); *id.* (noting tension between “preachers and teachers” in “suits” and the “little people”).

not overwhelm the movement's beneficiary constituency. As the social historian Charles Payne remarked in his study of the Mississippi movement, the Student Nonviolent Coordinating Committee (SNCC) "will always be remembered for its militance, but an even more important key to its legacy is the respect it had for people regardless of their status and the ways in which that respect empowered those people to make the contributions they had in them."³⁶⁰ The success of SNCC in this regard was rooted in its rejection of the hierarchical model of leadership associated with the NAACP.³⁶¹

In sum, progressive social movements are instances of insurgent political activity, usually initiated by or on behalf of low-status or socially marginal citizens, that are unmediated by the state or conventional political structures.³⁶² Citizens speak in their own voices and in ways that may not be recognized as appropriate forms of communication in traditional political institutions. That means that social movements, by design, are outside of the "mainstream." Indeed, the consensus among social movement scholars is that "it is their marginality which distinguishes them [social movements] from other political organizations."³⁶³ Their "abnormality" poses a threat to institutionalized politics, and it is this threat of disorder that gives social movements influence. As Doug McAdam surmised in his study of the 1960s civil rights movement, "What marks social movements as inherently threatening is their implicit challenge to the established structure of polity membership and their willingness to bypass institutionalized political channels."³⁶⁴ The same could be said of other social movements, ranging from abolitionism to the contemporary antiabortion movement.³⁶⁵

360. Payne, *supra* note 354, at 185 (distinguishing SNCC from other groups infected with "class snobbery" such as the NAACP); see also Barbara Ransby, *Ella Baker and the Black Freedom Movement: A Radical Democratic Vision* 272-73 (2003) (explaining how Ella Baker's message to "SNCC organizers to suppress their own egos[,] . . . approach local communities with deference and humility . . . [and] resist organizational chauvinism" was instrumental in shaping "SNCC's radical democratic approach").

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361. On SNCC's ethos, see Payne, *supra* note 354, at 97-102 (noting how SNCC leaders had "a broad sense of community, [were] intolerant of invidious distinctions among people and concerned with the well-being of individuals as such").

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362. See, e.g., Piven & Cloward, *supra* note 334, at 14-23 (discussing insurgencies and how "institutional roles determine the strategic opportunities for defiance" in that individuals "typically . . . rebel[] against the rules and authorities associated with their everyday activities" even if they are not "the true centers of power").

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363. Burstein, *Social Movements*, *supra* note 334, at 7; see also Burstein, *Mobilization*, *supra* note 322, at 1203 ("For most sociologists, and for many political scientists studying social movements, the distinction between political action 'inside the system' and that taking place 'outside' is critical.").

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364. McAdam, *Political Process*, *supra* note 316, at 26.

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365. On antiabortion politics, see generally, for example, Victoria Johnson, *The Strategic Determinants of a Countermovement: The Emergence and Impact of Operation Rescue Blockades*, in *Waves of Protest*, *supra* note 334, at 241 (discussing "strategic determinants of [the] countermovement organization[] Operation Rescue").

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The differences between legal norms and the collective behavior involved in progressive social movements are substantial, even if they exist on a political continuum.³⁶⁶ As I have explained, social movements are premised on direct appeals to public opinion and widespread community involvement, and the tactics that they typically use are predicated on the value of democratic experimentalism.³⁶⁷ Lawyers, by contrast, must translate claims about social problems into the language and form of law, framing them as constitutional issues, for instance. They do so for purposes of appealing in a formal forum (the courtroom) to a factfinder unaccountable to the public, rather than to the public generally, or to those with direct power over public policy.³⁶⁸ During this process of translating clients' stories into legalese, as Professor Herbert Eastman explains, the "social chemistry underneath" injuries is made invisible, and "we lose the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society,

366. See Burstein, Social Movements, *supra* note 334, at 7–9 (arguing that scholarly tendency to view social movements as radically different from interest groups undervalues the similarities between the two). But see Tilly, Movements and Politics, *supra* note 348, at 303–08 (delineating distinction between social movements and national social movements).

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367. For descriptions of direct action tactics and goals, see Anderson, *supra* note 343, at 83–87, 114–24, 241–42, 246–47; Morris, Origins, *supra* note 342, at 275–90. For discussion on democratic experimentalism, see Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998) (describing democratic experimentalism as form of government in which power is decentralized to enable citizens to use local knowledge to solve problems).

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368. The NAACP's voting rights and school desegregation victories are paradigmatic of the incremental and sometimes inconsequential effect of legal action, even when civil rights lawyers prevailed in court. Consider the voting rights example. The NAACP's first legal victory in the voting rights context occurred in *Guinn v. United States*, 238 U.S. 347 (1915), in which the Court invalidated the Grandfather Clause of the Oklahoma Constitution and held that the Fifteenth Amendment restricts the power of government to deny citizens the right to vote on account of race, color, or previous condition of servitude. This victory was followed by other landmark voting rights cases, including *Nixon v. Herndon*, 273 U.S. 536 (1927), which found Texas's white primary unconstitutional, and *Smith v. Allwright*, 321 U.S. 649 (1944), where the Court invalidated various mechanisms that southern states had used to preserve the white primary, *Guinn* notwithstanding. Despite this string of NAACP victories, the vast majority of African Americans remained unable to vote in the South into the 1960s; this situation remained until Congress, reacting to direct action protests initiated by Dr. King's Southern Christian Leadership Conference and SNCC, passed the Voting Rights Act of 1965. See Fairclough, *supra* note 298, at 249–53 (1987).

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On the direct action movement's frustration with the slow pace of social change resulting from the courts, see Roy Wilkins & Tom Mathews, *Standing Fast: The Autobiography of Roy Wilkins* 269–70 (1982); see also Jack Greenberg, *Crusaders in the Courts* 267–68 (1994) [hereinafter Greenberg, *Crusaders*] (noting that LDF lawyers had "limited resources; so little time to do everything right; [and] enormous pressure not to slip up on any detail" and were responding to needs of demonstrators who protested whenever their demands were unmet).

the significance of it all.”³⁶⁹ Law is, then, the essence of a state-mediated process, one that privileges arcane language and expertise over the frames of reference familiar to laypeople.

Even when favorable outcomes are achieved through the legal process, legal remedies are unlikely to satisfy a social movement’s conception of substantive justice because courts are likely to adopt a centrist alternative to a progressive social movement’s goals. Remedies that aspire to distributive justice—for instance, structural injunctions used in school desegregation cases—are considered extraordinary exercises of judicial power.³⁷⁰ Thus, these judicial remedies generally have not fared well during the implementation process; as discussed below, the school desegregation decree is a prime example of this system failure.³⁷¹ Finally, the manner in which the law may benefit social movements is unpredictable. Professor Klarman’s scholarship on *Brown v. Board of Education*, propounding a backlash thesis to explain the perverse relationship among black protest, white violence, and civil rights legislation, demonstrates this point.³⁷² Given the limited nature of legal remedies, the unpredictable ways in which legal strategies can aid social movements, and the ancillary role that law often plays to politics, law in the courts is an implausible tool of choice for protest groups seeking distributive justice.³⁷³

This description of social movements demonstrates the extent to which Professor Eskridge’s conception of social movements is underdeveloped. Eskridge’s and other legal scholars’ conception of social movements diverges from the framework found in the social science literature in fundamental ways. Social movements aspire to remedy the ways in which institutionalized politics—the electoral process, representative government, and the legal system—place those who are not repeat players (or who do not otherwise command influence) in these arenas at a great disadvantage. The influence of these activists is constrained by characteristics (such as gender, race or ethnicity, class, geography, or religion) that limit their success in “normal” (that is, institutionalized) political channels. Accordingly, they organize outside of and against forums of exclusion, and they attempt to gain leverage by disrupting or threatening to disrupt, and thereby undermining, normal decisionmaking channels.

369. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 Yale L.J. 763, 766 (1995) (civil rights lawyer describing “chasm” between voices of his clients and “factual allegations in the complaint—sterile recitations of dates and events that lost so much in the translation”); cf. Constance Baker Motley, *Equal Justice Under Law* 131–32, 149 (1998) (observing disconnect between court action and direct action during Civil Rights era).

370. See Owen M. Fiss, *The Civil Rights Injunction* 10–12 (1978) (discussing desegregation injunctions in the context of reparations).

371. See *infra* notes 407–427 and accompanying text.

372. See generally Klarman, *Backlash*, *supra* note 27.

373. Cf. Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* 171 (1993) (asserting that “adjudicatory path to racial justice has proven unworkable”).

Participants do not naturally or necessarily view constitutional law in the courts as constitutive of their identities. Nor does law necessarily determine a social movement's agenda and shape its path to the extent that Eskridge suggests. Though consideration of how social movements relate to juridical law and the legal process is important,³⁷⁴ observing and preserving the analytical distinction between the two enhances our ability to avoid a juricentric, legalist worldview that excludes or diminishes the uniqueness of these noninstitutionalized forms of political action.

D. *The Definitional/Inspirational Role Distinction*

The relationship between social movements and law is essentially antagonistic, but activists do and must utilize legal processes when necessary to advance their goals. Given the tension between the two, however, the objectives of such movements typically will be best served by circumspection about legal epistemologies and processes. Calculated, strategic uses of law that do not threaten the movement's ability to exercise influence by introducing conflict may be advantageous. Litigation or the threat of litigation might be a tactic among a broader arsenal of tools to which the movement turns at an opportune moment. But if law wholly defines a social movement in the way that recent constitutional scholarship suggests that it does or should, the movement likely would lose its capacity to shape, or stand outside of, the decisionmaking processes of political and legal elites.

The decisionmaking calculus that I suggest can be captured by distinguishing between two ways in which law and social movements can relate: Law in the courts can play either a definitional role or an inspirational role in social movements. Social movements may profitably use rights talk to inspire political mobilization, even though legal mobilization theorists overstate law's effectiveness in this regard. But social movements that make litigation definitional to their agendas threaten their insurgent role in the political process. Without an insurgent element, social movements lose their agenda-setting ability.

1. *Law as Definitional.* — The experience of the BAMN intervenors suggests the utility of recognizing a distinction between the definitional and inspirational roles that law in the courts can occupy in social movements. By choosing to intervene in *Grutter* rather than, for example, confine its action to community organizing, BAMN narrowed its broad goal of leading a "new civil rights movement" to a single, narrow objective: preserving affirmative action. Law in the courts became definitional to BAMN's putative mass movement by virtue of the intervention. A few examples from the *Grutter* intervention demonstrate the point that when law in the courts plays a definitional role in a social movement, it is the dictates of law, rather than the movement, that determine the agenda.

374. See Burstein, Mobilization, *supra* note 322, at 1204.

First, consider that, in contrast to the affirmative agenda for change that social movements pursue, the intervenors' role in the litigation was reactive and defensive at nearly every turn. *Grutter* was not affirmative litigation brought by the plaintiffs to challenge "racial caste" in education. Instead, the intervenors' trial strategies and written and oral arguments were shaped by the actions of the array of other actors involved in the litigation—most clearly, the CIR. The CIR defined the terms of engagement for BAMN and the other participants in the court debate over race-conscious admissions. The intervenors filed motions that responded to the plaintiffs' allegations of reverse discrimination. BAMN defended affirmative action by inverting the CIR's claims. The CIR claimed that its plaintiffs were entitled to admission to the university because of their superior credentials; the intervenors made the flip side of that argument, claiming that the credentials were themselves discriminatory. The plaintiffs framed the debate in such a way that even the moral claims of the intervenors, based on historical discrimination, were coopted.

BAMN's arguments and actions were also constrained by the choices of the defendant, the University of Michigan. If the university had chosen not to mount a defense based on the propositions that diversity and selectivity are mutually exclusive,³⁷⁵ and that its admissions criteria adequately capture merit,³⁷⁶ then the credentials bias argument of the intervenors would have stood on a much different footing. Moreover, whether the intervenors could have a voice in the Supreme Court largely was determined by the university, which indicated its unwillingness to share time or support the intervenors' request for additional time.³⁷⁷

The intervenors' claim that the university's admissions criteria were discriminatory represented an attempt at leadership despite the law-as-definitional context. In making this claim, the intervenors were able to air their concern that the university's use of affirmative action was but a response to "self-inflicted wounds" left by its own "exclusionary admissions system."³⁷⁸ Had they prevailed in their argument, the student intervenors likely would have precipitated a restructuring of the admissions systems used in higher education (presumably in a way favorable to black and Hispanic students).³⁷⁹ The collateral effects of such a victory likely

375. See *supra* notes 76–77 and accompanying text.

376. See *supra* note 76 and accompanying text.

377. See *supra* notes 210–212 and accompanying text.

378. See *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) ("Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.").

379. One unintended consequence of decreasing reliance on numbers-only criteria would likely be an increase in administrators' discretion in the educational process, which might have profoundly negative consequences. Certainly, administrative discretion has not worked well for African Americans seeking educational equality in the past. See Joe R. Feagin et al., *The Agony of Education* 115–27, 133–34 (1996) (discussing how administrative discretion in areas such as academic advising and counseling creates barriers to success at predominantly white colleges and universities); Klarman, Jim Crow,

would be widespread. It would call into question the validity of the range of quantitative data used to decide how societal goods are distributed.³⁸⁰ Of course, the students did not prevail on this argument, in part because of the environment in which they initiated their protest.³⁸¹

The law-as-definitional context in which the intervenors operated is best demonstrated by the fact that even the rhythms and scope of their protest tactics were shaped by the drama unfolding in the courtroom. Generally speaking, BAMN's demonstrations were designed to achieve a narrow purpose: persuading the federal courts to find the law school's affirmative action policy lawful.³⁸² As a result, the intervenors' demonstrations generally occurred at crucial points in the litigation,³⁸³ and thus they were at the behest of others and responsive to the timetable mandated by the litigation process. In response to the CIR's filing suit against the University of Michigan's affirmative action policies, BAMN staged periodic protest demonstrations, including one on the day after the filing.³⁸⁴ Subsequent to the students' intervention in *Grutter* as defendants on March 26, 1998, BAMN staged protests at pivotal points in the legal cases, including after the district court issued opinions for the plaintiffs, and during arguments on appeal to the Sixth Circuit.³⁸⁵ This cycle of protests to influence the course of the legal actions culminated in

supra note 27, at 255–59, 330, 358–59 (discussing school board manipulation of pupil placement criteria during *Brown* era). Indeed, the movement toward more objective, routine procedures typically is a hallmark of a more equitable socioeconomic structure. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring) (stating that unbridled discretion vested in judges and juries by capital punishment statutes generated pattern of death sentencing that “smacks of little more than a lottery system”).

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380. See Guinier, *Admissions Rituals*, supra note 5, at 131–35 (describing development of system using quantitative measures for admissions and its role as “one of the primary gatekeepers to upward mobility”).

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381. See supra notes 109–112, 200 and accompanying text. Nevertheless, it is notable that Justice Thomas, an ardent opponent of affirmative action and a *Grutter* dissenter, indicated some agreement with the intervenors' claim that the law school's admission criteria are systematically discriminatory. See *Grutter*, 539 U.S. at 361, 367, 370 (Thomas, J., concurring in part and dissenting in part) (questioning fairness and usefulness of law school's admission's criteria in determining which students attend). Judge Bernard Friedman, who tried *Grutter* and ultimately struck down the law school's race-conscious policies, likewise found aspects of the intervenors' argument compelling, if not persuasive enough to overcome the plaintiffs' case. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 855–65, 866–72 (E.D. Mich. 2001) (discussing BAMN's evidence on causes of weaker quantitative merit measures among blacks and Hispanics, finding inferior K-12 educational opportunity a significant influence on weaker scores and grades, but holding that neither past discrimination, nor present, societal discrimination provides constitutionally compelling justification for race-conscious law school admissions), rev'd 288 F.3d 732, 744–52 (6th Cir. 2002) (en banc).

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382. See supra notes 100–108 and accompanying text.

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383. See supra notes 101–103, 107–108 and accompanying text.

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384. See BAMN Protests the New Michigan Anti-Affirmative Action Lawsuit (Oct. 15, 1997), at <http://www.bamn.com/news/index.asp?go=GO&cat=&yr=1997&mo=10&first=375&last=366> (on file with the *Columbia Law Review*).

385. See supra notes 107–108 and accompanying text.

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BAMN's April 1, 2003 protest at the United States Supreme Court during oral arguments in *Grutter* and *Gratz*.³⁸⁶ The final protest of the bitterly disappointed intervenors was made in defiance of their counsel's exclusion from oral argument.³⁸⁷

Even when the intervenors were able to make appearances in court, however, their strategy of creating narratives to support their claim for social justice met with resistance from presiding judges. The trial court ensured that the students' counsel refrained from straying from legally relevant testimony and "politicizing" the trial. For instance, both the plaintiffs and the judge questioned whether Massie, the intervenors' lead counsel, should be allowed to call Professor Gary Orfield, the expert on school desegregation in lower school education, to testify.³⁸⁸ Orfield was important to Massie's case because her theory that affirmative action rightly is seen as a remedy for discrimination turned on showing that a race-based educational caste system exists in America. Orfield, who would testify that the public educational system is overwhelmingly segregated and that minorities attend inferior schools,³⁸⁹ could provide evidence supporting the intervenors' caste claim.³⁹⁰ One exchange between the judge and intervenors' counsel on the issue of whether witnesses such as Orfield were relevant was particularly striking. Massie's co-counsel, attorney George Washington, charged,

In our view, Judge, the Court just like the overwhelming majority of white people in this country does not . . . have an adequate understanding of race and racism in the United States and we are presenting witnesses who we think are vital for this Court to hear on this case which is of critical importance for race and race relations. . . . [W]e believe you must hear what our witnesses have to say³⁹¹

During oral argument at the Sixth Circuit Court of Appeals, Massie tried to go on the offensive, but was rebuked. She attempted to present the court with a petition containing fifty thousand signatures of Americans who reaffirmed "our national commitment to *Brown v. Board of Education*" and thus, Massie argued, to affirmative action.³⁹² In rejecting the

386. See *supra* note 101 and accompanying text.

387. See *supra* notes 210–217 and accompanying text.

388. See, e.g., Record of Jan. 23, 2001, at 5–6, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928) [hereinafter Jan. 23 Record, *Grutter*] (discussing relevance of Orfield's expertise to the proceeding and permitting continuing objection to his testimony to be noted on record).

389. See Gary Orfield & Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 53–76 (1996) (discussing growth of segregation in recent decades as resulting in separate and unequal schools for minority students).

390. See Record of Jan. 16, 2001, at 67–70, *Grutter* (No. 97-CV-75928) (Massie discussing relevance of Orfield testimony to her case).

391. Jan. 23 Record, *Grutter*, *supra* note 388, at 79.

392. Transcript of Oral Argument at 7, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447/1516).

petitions, the court admonished her that public opinion does not decide lawsuits:

We decide the case on the law and the facts and we want it very clear that we are not policymakers. We are not a legislative body. We are not the executive branch. We are the judiciary. . . . So, the petitions are not of any benefit in our decision making. . . . [W]e prefer to hear from you the law of why what the University of Michigan Law School is doing is appropriate and authorized under the Constitution.³⁹³

The court's comment perfectly captures how law checks the overtly activist impulses of the cause lawyer. The intervenors' arguments and tactics breached the norms of the legal process and conventions of the courtroom.³⁹⁴ It is, then, no surprise that their perspective was largely disregarded—their counsel's political sophistication notwithstanding.

2. *Law as Inspirational.* — Despite their setbacks in the litigation, the experience of the *Grutter* intervenors supports legal mobilization theorists' view that indirectly beneficial effects may flow from litigation campaigns—that law in the courts may be inspirational. The intervenors likely raised the political consciousness of client communities affected by the suit in three ways, according to counsel, and all of these inspirational effects seem plausible.³⁹⁵ As a result of the intervention, students were “excited” by the prospect of political activism (regarding educational inequality, in particular), developed a “desire to be leaders,” and became participants in the litigation, including the demonstrations.³⁹⁶ BAMN pricked the conscience of students and parents by reaching out to them in schools and through canvassing door-to-door, mainly in Detroit.³⁹⁷ Many of the students involved in the intervention agree that BAMN's outreach galvanized their communities.³⁹⁸ Some have continued activism for quality education instigated as a result of BAMN's outreach.³⁹⁹

393. *Id.*

394. Petitions and other such messages traditionally are thought to affront the independence of the judiciary. An interesting historical example comes from the trial of Julius and Ethel Rosenberg, when the National Committee to Secure Justice attempted to present a petition with fifty thousand signatures to the Supreme Court. See Vose, *supra* note 152, at 29 (noting Rosenberg petition as example of “mass petitioning” intensely disapproved of by courts).

395. Massie Interview, *supra* note 92, at 1–5, 28–29.

396. *Id.*

397. *Id.*; Jan. 23 Record, *Grutter*, *supra* note 388, at 38–43 (intervenor Erika Dowdell testifying that BAMN presentation during her senior year in high school inspired her to engage in activism to preserve integration and to apply to University of Michigan).

398. Many of these students were associated with BAMN prior to its intervention; therefore, they presumably would be inclined to view the organization's work favorably. See Massie Interview, *supra* note 92, at 1–2.

399. BAMN is now embroiled in a political battle over school governance in Detroit that revolves around the question of how much power city residents will and should have over the public schools. See Zurich Dawson, Proposal E: No: Put Power Back into the Hands of Detroiters, *Detroit Free Press*, Oct. 13, 2004, 2004 WLNR 9820280 (praising BAMN and explaining why readers should reject the ballot measure); Chastity Pratt &

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But there is little evidence suggesting that the intervenors' litigation-rooted approach mobilized a broad segment of their target constituency (students and others in the client-community) and their target audience (the public) around the injustice of the "racial caste perpetuating" features of higher and secondary school education.⁴⁰⁰ This is the case, I suspect, because law's definitional role in the campaign undercut its inspirational impact.

According to social movement theorists, the client-community and public opinion must be both the initial and primary targets of a social movement's attention if the movement is to have a chance of influencing policy and law.⁴⁰¹ The intervenors' ability to leverage their participation in the litigation to achieve a significant inspirational impact was impeded by the fact that the lawsuit diverted its attention from the appropriate target audiences. By necessity, the presiding courts and other parties in the litigation were the intervenors' primary audiences. Thus, BAMN's participation in the litigation assured that it could not focus its energies where they were most needed and could not broadly communicate the injustices that it perceived salient to potential converts to the movement.

The dominant role of litigation in BAMN's movement gave rise to another impediment to their ability to generate a significant inspirational impact. As Part I explains, the high-status interest groups comprising the utilitarian strand of the coalition were the focal points of media interest in the cases throughout the course of the litigation.⁴⁰² The filing of a record number of amicus briefs in support of the university by military leaders, Fortune 500 companies, and the academic establishment was the story that the media reported.⁴⁰³ As a result, the utilitarian rationales that these elites offered for backing affirmative action—that diversity is good for business, national security, and the legitimacy of our democracy—defined the issue and the story.⁴⁰⁴ Under these circumstances, BAMN's caste-based perspective on the debate was lost or minimized. To the extent that the media mentioned the salience of the credentials gap in the affirmative action debate, they repeated the CIR's narrative—unchallenged by the university and the utilitarian elites—that minorities are

Peggy Walsh-Sarnecki, Proposal E: Control at Stake, *Detroit Free Press*, Oct. 8, 2004, 2004 WLNR 9817155 (describing battle over Proposal E, which, if approved by voters, would permit mayor to nominate chief executive officer to guide academic policies in Detroit schools).

400. See Burstein, *Social Movements*, supra note 334, at 12 (arguing that social movements may affect policy by "changing legislators' perceptions of the public preferences or their intensity, by changing preferences themselves, or by changing the importance of the issue to the public").

401. *Id.*

402. See supra notes 125–130 and accompanying text.

403. See supra notes 131–136 and accompanying text.

404. France & Sydmonds, supra note 201, at 30 (suggesting that business community argued for Michigan's affirmative action programs because it recognizes that in the future, majority of corporate customers and workers will be minorities).

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less well qualified than whites for admission to college and law school.⁴⁰⁵ Under these circumstances, BAMN was not able to reframe the credentials issue as one about discrimination against minorities rather than against whites—a necessary predicate to unleash a broad inspirational message on its target constituency and audience.⁴⁰⁶

The negative impact of law's definitional role on the intervenors' ability to reframe the issue extends beyond the dynamics of *Grutter* itself. The larger context of the Court's jurisprudence on race and education is highly relevant to the question of how large of a positive, mobilizing impact law in the courts could have been expected to generate about racial caste in education. The context of race and education is an especially dubious predicate for theorists' confidence that litigation's beneficial, indirect effects disprove the critical commentary on law and change. There is little reason to believe that rights talk—even when accompanied by victories on liability—is an especially useful way of mobilizing communities around the anticaste goal. Even a cursory examination of litigation about the equal protection rights of minority students points to a sobering conclusion. When the "discursive frameworks," "opportunity structures," and symbolic significance that flow from litigation are considered in the context of education,⁴⁰⁷ the conclusion that many, and probably most, of its radiating effects have been profoundly negative for students of color is hard to miss. In fact, it is difficult to point to a context in which critics' pessimistic view of law's ability to produce fundamental change is more fitting.

A large and growing body of scholarship, written by commentators across the political spectrum, attests that many of the cues created over the long course of educational civil rights litigation have been deleterious.⁴⁰⁸ Generally speaking, many of both the direct and indirect effects of race and education litigation over the past several decades, whether

405. See *supra* note 201 and accompanying text.

406. See *supra* notes 226–232 and accompanying text.

407. See McCann, Reform Litigation, *supra* note 308, at 733; Minow, *supra* note 319, at 306–11 (discussing how legal rights become “possessions of the dispossessed”).

408. See Jack M. Balkin, *Brown as Icon*, in *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* 3, 5–7 (Jack M. Balkin ed., 2001) (noting that despite *Brown's* status as an “icon” confirming the “Great Progressive Narrative” of American history, its desegregation remedies “have been honored in the breach more than the observance”); Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 8–10, 14–28, 130–37 (2004) (arguing that *Brown* was a “mirage” that did not bring about equality and that a ruling demanding equality in separate-but-equal paradigm would have been preferable); see also James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 206–23 (2001) (acknowledging limited impact of *Brown* on quality of education provided to blacks but concluding that *Brown* had significant and positive symbolic impact on American race relations).

involving elementary and secondary school⁴⁰⁹ or higher education,⁴¹⁰ whether in state⁴¹¹ or federal court,⁴¹² have been demobilizing because educational litigation has tended to reinforce rather than disrupt long-standing and continuing racial stratification in the socioeconomic order.

Educational litigation has defined educational equality not in terms consistent with an anticaste principle for students of color, but rather as social integration or in terms of the adequacy of educational inputs or resources.⁴¹³ When lawyers have defined equality as racially integrated education, the litigation has had limited success.⁴¹⁴ The Court's doctrine in *Milliken v. Bradley*, for example, effectively foreclosed the possibility of integrated schooling in the central cities.⁴¹⁵ More damning is the fact that even when the Court has issued favorable rulings, the litigation has produced unfavorable results. For example, *Swann v. Charlotte-Mecklenburg Board of Education*, the 1971 case in which the Court upheld the constitutionality of gerrymandered school districts and busing to achieve the

409. See *Missouri v. Jenkins*, 515 U.S. 70, 74–80 (1995); *Freeman v. Pitts*, 503 U.S. 467, 472–74 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240–44 (1991); *Milliken v. Bradley*, 418 U.S. 717, 733–44 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6–17 (1973).

410. See *United States v. Fordice*, 505 U.S. 717, 729–32 (1992) (holding that merely adopting and implementing race neutral policies to govern college and university system did not necessarily fulfill state's affirmative obligation to disestablish prior de jure segregated system); see also Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 *Duke L.J.* 753, 798 (2000) [hereinafter Brown-Nagin, *Deregulated Education*] ("Most of the relevant precedents reveal a philosophical gap between states' efforts at racial balance and what the Court believes the Constitution requires of districts that previously intentionally discriminated against African Americans."); Fair, *supra* note 64, at 1843–48 (noting endurance of separate but unequal educational opportunity despite significant action by Supreme Court).

411. For a discussion of disappointments encountered in state-level education litigation, see Brown-Nagin, *Deregulated Education*, *supra* note 410, at 772–84 (discussing charter schools); J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 *Yale L. & Pol'y Rev.* 607, 630–703 (1999) (discussing ups and downs of school finance litigation in Texas); James R. Gooch, *Fenced In: Why *Sheff v. O'Neill* Can't Save Connecticut's Inner City Students*, 22 *Quinnipiac L. Rev.* 395 (2003) (discussing problem in landmark state-level victory); Molly S. McUsic, *The Law's Roles in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform: Six Strategies for Promoting Educational Equity* 88, 102–36 (Jay P. Heubert ed., 1999) (discussing school finance reform litigation and its failure to cure national inequities in education).

412. Brown-Nagin, *Deregulated Education*, *supra* note 410, at 778–99; see also *supra* note 409.

413. See Fair, *supra* note 64, at 1844–46, 1851–62.

414. See, e.g., Ronald P. Formisano, *Boston Against Busing: Race, Class and Ethnicity in the 1960s and 1970s* 1–44, 88–203 (1991); Gregory S. Jacobs, *Getting Around *Brown*: Desegregation, Development, and the Columbus Public Schools 196–98* (1998) (discussing how desegregation in Columbus failed to provide equal education opportunity to all children and resulted in inequities now on a broader scale); Raymond Wolters, *The Burden of *Brown*: Thirty Years of School Desegregation* 3–8, 273–77 (1984).

415. *Milliken v. Bradley*, 418 U.S. 717, 733–44 (1974).

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maximum degree of pupil integration⁴¹⁶ precipitated a wide-ranging backlash, as has school desegregation litigation generally. The resistance was evinced by white flight from the cities into the suburbs, where fewer minorities live,⁴¹⁷ and minority resistance to the goal of integrated schooling.⁴¹⁸ As a consequence of these dynamics, black and Hispanic students attend overwhelmingly segregated schools.⁴¹⁹

Similarly, litigation over educational inputs has a spotty record of success.⁴²⁰ Celebrated wins on liability in state-level litigation, such as *Abbott v. Burke*⁴²¹ in New Jersey, were followed by years of wrangling between courts and legislatures over the precise nature of the remedy.⁴²² State legislators who answer to white majorities were less than enthusiastic about complying with court orders mandating increased expenditures in majority-minority school districts.⁴²³ Litigation resulting from noncompliance with these orders sent a message that black and Hispanic communities are not important actors in the political community or in the marketplace.

Part of the difficulty in this area derived from the paradigm on which educational litigation was based: *Brown v. Board of Education*. The Supreme Court justified its outcome in *Brown* in terms that reinforced in the public imagination the social aspects of racial inequality, rather than its material or political aspects.⁴²⁴ Specifically, the Justices spoke of eliminating the stigma of racially separate learning environments.⁴²⁵ As a consequence of this reasoning, say scholars such as Professor Lani Guinier, students of color seeking legal redress have been viewed as deficient supplicants seeking to invade white social spaces.⁴²⁶ This negative message saturates the culture,⁴²⁷ and it is highly likely that minority communities'

416. 402 U.S. 1, 1 (1971).

417. See Brown-Nagin, Identity Caricature, supra note 165, at 1930–34; Orfield & Eaton, supra note 389, at 302–03, 308, 314–18.

418. See, e.g., Bell, Two Masters, supra note 165, at 471–93 (noting emergence of resistance in minority communities to “unconditional integration” policies); Brown-Nagin, Identity Caricature, supra note 165, at 1928–40; Michel Marriott, Louisville Debates Plan to End Forced Grade School Busing, N.Y. Times, Dec. 11, 1919, at B13.

419. See Orfield & Eaton, supra note 389, at 53–71.

420. See McUsic, supra note 411, at 102–08; Ryan, supra note 176, at 299–304.

421. *Abbott v. Burke* (*Abbott I*), 495 A.2d 376, 380 (1985) (finding school finance schemes unconstitutional).

422. See generally Alexandra Greif, Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing the *Abbott V* Mandate, 22 Yale L. & Pol’y Rev. 615 (2004) (discussing the lineage of New Jersey funding case, including ten New Jersey Supreme Court opinions and three major legislative overhauls seeking to comply with decree but noting that court-ordered remedy “has yet to become a reality”).

423. *Id.* at 641–43.

424. See Guinier, Interest-Divergence, supra note 221, at 94–96.

425. See generally Tomiko Brown-Nagin, A Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark, 48 St. Louis U. L.J. 991, 993 (2004).

426. Guinier, Interest-Divergence, supra note 221, at 96 n.9 (citing literature that addresses how *Brown* had effect of polarizing blue-collar whites and restigmatizing blacks).

427. *Id.*

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disenchantment with integration (where it exists) is—at least partially—a response to the signal.

Finally, law's substantive and discursive frameworks also were at odds with the intervenors on credentials bias, the precise issue that they wished to foreground in the litigation. In contrast to Title VII law on testing in employment, pursuant to which plaintiffs can challenge testing policies under intentional and disparate impact theories of discrimination,⁴²⁸ the law pertaining to educational testing in higher education is underdeveloped and unfavorable to parties seeking to challenge the fairness of admissions criteria. Claims of intentional discrimination premised on equal protection are likely to fail due to long-standing precedent⁴²⁹ that requires plaintiffs to prove intent on a standard "akin to malice" in the criminal law.⁴³⁰ And in a recent decision, *Alexander v. Sandoval*, a divided Court held that there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act.⁴³¹ *Sandoval*, viewed by civil rights litigators as a tremendous setback,⁴³² would seem to preclude what had been the most viable legal theory for challenging test bias.⁴³³ The clear message flowing from this law is that

428. See, e.g., *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Guardians Ass'n of New York City Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980). This is not to say that the employment testing regime and the law that governs it are without flaws. See generally Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251 (1995) (criticizing merit and efficiency, and specifically weak predictive strength of tests in employment context).

429. See *Washington v. Davis*, 426 U.S. 229, 241 (1976) (holding that plaintiffs challenging facially neutral state action have to demonstrate that state acted with discriminatory purpose in order to make out equal protection claim).

430. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1135 (1997) (arguing equal protection standards require proof that legislators adopted a policy that could foreseeably injure women and minorities and acted with legislative state of mind akin to malice).

431. 532 U.S. 275 (2001).

432. See Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 Yale J. Health Pol'y, L. & Ethics 215, 238–239 (2003) (noting that *Alexander v. Sandoval* "sent shockwaves through the civil rights community" by "abrogating the right of individuals to bring private actions under Title VI to enforce the disparate impact regulations"); Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U. J. Legis. & Pub. Pol'y 35, 47 (2004–2005) ("The effectiveness of litigation strategies based on Title VI, however, has been diminished significantly by the Supreme Court's opinion in *Alexander v. Sandoval*").

433. Some of the law on testing in elementary and secondary education, pre-*Sandoval*, might have provided an avenue for a disparate impact claim. Some due process cases also might be viable predicates for legal challenges. See, e.g., *Johnson v. Sikes*, 730 F.2d 644 (11th Cir. 1984); *Brookhart v. Bd. of Educ.*, 697 F.2d 179 (5th Cir. 1983); *Groves v. Alabama*, 776 F. Supp. 1518 (M.D. Ala. 1991); *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989); *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979); *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla.

credentials bias in higher education is not a legally cognizable issue. Accordingly, there is little reason to think that this case law, coupled with the disappointing track record of educational litigation, would have positive, inspirational effects.⁴³⁴

E. *Mobilizing Outside of the Law*

As a consequence of its juricentric view of social movements, the legal literature glosses over important distinctions between these movements and the law. This Part has delineated some of these distinctions by discussing historical examples of mass movements for change, the social science literature, and the *Grutter* intervention. I have noted the dissonance between constitutional lawmaking in the courts and the objectives and tactics commonly associated with protest movements. In the process, I have argued that the legal literature wrongly assumes that constitutional law and rights are especially relevant to social movements. To be clear, I have not argued that constitutional law is irrelevant to social movements. Here, I offer further thoughts on the overarching normative question raised by this Article: Given the tension between social movements and the juridical law, what should be the relationship between the two?

Generally speaking, lawyers are not well positioned to mobilize communities because of their commitment to legal processes. Consequently, the ability of communities to leverage the law for social change should not be understood as a power resting with attorneys. Lawyers—litigators, in particular—must be willing to cede leadership of movements for change to nonlawyers, or, at the very least, to vest initial leadership in nonpracticing⁴³⁵ or radically client-centered

1979), *aff'd* in relevant part, 644 F.2d 397 (5th Cir. 1981), on remand, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Bd. of Educ. v. Ambach*, 436 N.Y.S.2d 564 (Sup. Ct. 1981).

434. There are, however, circumstances under which adversity can be inspirational. The best examples of adverse legal rulings having a mobilizing effect on social movements in race relations history come from the nineteenth century. The Court's ruling in *Dred Scott v. Sandford* that slaves could not be citizens inspired defiance among antislavery activists and led them to redouble their efforts to end slavery. See 60 U.S. 393 (1856) (finding Missouri compromise unconstitutional and holding that U.S. Constitution recognizes slaves as property, and, therefore, that blacks could not be citizens and were not entitled to enjoy the privileges and immunities of citizenship). For discussions of abolitionists' reactions to the decision, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 429 (1978); see also Quarles, *supra* note 284, at 231–34. I plan to explore this subject in a subsequent work.

435. Julie Su's article detailing the achievements of inexperienced lawyers who abdicated legal stratagems for protest strategies in working with and on behalf of garment industry workers suggests the hopeful possibilities presented by this approach. See Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. Gender, Race & Just. 405 (1998) (discussing advocacy on behalf of enslaved garment workers and describing conflict between "social activism" and "traditional legal avenues"). Su concludes:

I am convinced that we succeeded in getting the workers released in just over a week in part because we did not know the rules, because we would not accept

lawyers.⁴³⁶ Those seeking to have an impact on the political and legal orders should not root a mass movement in the courts; instead, affirmative litigation about constitutional rights should be anchored upon and preceded by a mass movement. Efforts to achieve fundamental change should *begin* with the target constituency and be waged initially outside of the confines of institutionalized politics. Law should be understood as a tactic in an ongoing political struggle, where the struggle is the main event and favorable legal outcomes are its byproducts. There is a crucially important temporal component to this view. Legal claims can be tactically useful in a political strategy for achieving change—but only after social movements lay the groundwork for legal change. Social movements must first create political pressure that frames issues in a favorable manner, creates cultural norm shifts, and affects public opinion; these norm shifts then increase the likelihood that courts will reach outcomes favored by lawyers.⁴³⁷

Again, my claims find support in the history of the mid-twentieth-century civil rights movement. This narrative posits an intimate relationship between the sociopolitical dynamics within black client communities and the success (or failure) of civil rights lawyers' litigation campaigns for rights. The postwar civil rights movement confirms that the moral suasion of participatory democratic groups of nonlawyers, and typically nonelites, was integral to law's movement from a Jim Crow regime to a

procedures that made no sense either in our hearts or to our minds. It was an important lesson that our formal education might, at times, actually make us less effective advocates for the causes we believe in and for the people we care about.

Id. at 416–17.

436. On client-centered lawyering, see, e.g., Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992) (outlining a new model of activist legal practice); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1 (1990) (chronicling and analyzing experience of a welfare recipient and her lawyer throughout administrative hearing process). For commentary suggesting how and why lawyers' professional norms limit lawyers' willingness to cede decisionmaking power to clients and other laypeople, see, e.g., Bell, *Two Masters*, *supra* note 165 (analyzing unique lawyer-client relationship in school desegregation litigation); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. Rev.* 443 (2001) (discussing lawyer domination and other problems in lawyer-client relationship when lawyers seek to organize communities); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers Representation of Groups*, 78 *Va. L. Rev.* 1103 (1992) (discussing problems inherent in public interest lawyering where, implicitly or explicitly, lawyers represent groups of marginalized citizens); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 *Harv. C.R.-C.L. L. Rev.* 443 (1996) (describing tension inherent in author's dual roles as lawyer for activists and activist herself); Su, *supra* note 435, at 416–17 (criticizing attorneys who represent activists but who warn clients that they must "leave the 'real lawyering'—the hard core strategizing, brief writing, and arguing—to the real lawyers").

437. See Klarman, *Jim Crow*, *supra* note 27, at 10–17 (describing social and historical context of Supreme Court's *Plessy*-era decisions); Dorf, *supra* note 24, at 794 (arguing that "legal equality comes only when the ground has been prepared by social and political movements").

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constitutional order in which formal equality was the norm. During the past three decades, historians who have analyzed social change have discovered that small groups of inexperienced individuals can be the leading edge of a social movement, especially when they work in coalition with those who traditionally wield influence in society.⁴³⁸ Through their commitment to a social cause, ordinary people with no insider knowledge of the technical aspects of the broad issue on which they are mobilizing can create circumstances in which those with actual power (political, economic, and, ultimately, legal power) are persuaded to act in their favor.⁴³⁹

The Montgomery, Alabama bus boycott is a paradigmatic example. Designed to protest unfair treatment under Montgomery's bus segregation laws, the boycott was initiated and led by the city's African American residents, rather than instigated by lawyers. Rosa Parks, the churchgoing NAACP secretary of "unblemished character" who stood up to white bus driver J.F. Blake, provided a morally stark picture of Jim Crow's injustice.⁴⁴⁰ Reverend Martin Luther King, Jr. became the public face of the boycott by virtue of his election as president of the Montgomery Improvement Association (MIA), the organization that managed the protest.⁴⁴¹ Nonetheless, the backbone of the movement was made up of the constituents of the MIA, workaday people such as seamstresses, household servants, and low-wage laborers who were dependent on the buses for travel to their jobs.⁴⁴² Civil rights lawyers only became involved in the boycott

438. See, e.g., John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* 170–214 (1995) (discussing local activists' roles in civil rights movement); Lee, *supra* note 359 (discussing leadership of Fannie Lou Hamer, a sharecropper's daughter, in civil rights movement); Morris, *Origins*, *supra* note 342, *passim* (discussing importance of indigenous institutions and leaders to success of civil rights movement); Payne, *supra* note 354, at 180–206 (describing influence of local activists in Greenwood, Mississippi on other members of larger movement); Ransby, *supra* note 360, at 209–98 (discussing development of local poor, black leadership).

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439. See, e.g., William H. Chafe, *Civilities and Civil Rights: Greensboro, North Carolina and the Black Struggle for Freedom* 9 (1980) (describing how African Americans developed spirit of protest under veneer of deference to whites); Chafe, *Women and Equality*, *supra* note 341, at 81–113 (arguing that African Americans created social change during the 1960s in "social spaces" that served as places for planning strategies for communicating needs to government officials and leaders in business and industry).

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440. Fairclough, *supra* note 298, at 16; see Morris, *Origins*, *supra* note 342, at 52 (noting that Mrs. Parks's action "triggered the mass movement" in part because "she was a quiet, dignified woman of high morals").

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441. See Fairclough, *supra* note 298, at 17 (describing King's election); Morris, *Innovation*, *supra* note 349, at 51, 54–55, 62 (discussing how King brought "national and international attention to the movement").

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442. Minister E.D. Nixon, a boycott organizer, explained how the workaday lives of average blacks figured into the protest:

[After Mrs. Parks's act] I went home that night and took out a slide rule and a sheet of paper and I put Montgomery in the center of that sheet and I discovered that there wasn't a single spot in Montgomery a man couldn't walk to work if he really wanted to. I said it ain't no reason in the world why we should lose the boycott because people couldn't get to work.

later.⁴⁴³ While they ultimately garnered an order from the Supreme Court in *Gayle v. Browder* invalidating segregation on buses, the lawyers entered the scene only after local citizens had organized and sustained the boycott for many months.⁴⁴⁴ Civil rights lawyers certainly were integral to the formal victory that came in *Gayle v. Browder*.⁴⁴⁵ Lawyers provided crucial information to movement organizers about the legal implications of their goals and tactics and ultimately used their advocacy skills to implement the changes in law that desegregated the buses.⁴⁴⁶ But the most crucial activity—galvanizing public support for the boycott—began and ended with the grass roots. Thus, citizens on the margins of society engaged in collective action were the foundational change agents in the boycott, which in turn served as the “watershed of the modern civil rights movement.”⁴⁴⁷

This dynamic of local people preparing the way for legal change was prevalent during the course of the civil rights movement. The black struggle for political power in Alabama provides another salient example. The 1963 Birmingham protests, which involved white violent “backlash” dynamics, were an impetus for the passage of the Civil Rights Act of 1964.⁴⁴⁸ Protests in Selma and Montgomery, also coupled with the violent white resistance that they spawned,⁴⁴⁹ played a decisive role in the passage of the Voting Rights Act of 1965.⁴⁵⁰ The moral authority gener-

Morris, *Origins*, supra note 342, at 52; see also *id.* at 62 (noting King’s ability to attract “large segments of oppressed blacks from the poolrooms, city streets, and backwoods long enough for trained organizers to acquaint them with the workshops, demands, and strategies of the movement”); Fairclough, supra note 298, at 16 (explaining how “inception of the boycott” came from “lay people”).

443. See Greenberg, *Crusaders*, supra note 368 (describing boycott as a “community mobiliz[ation]” effort).

444. See *id.* at 212–13 (explaining boycott and timing of lawyers’ involvement).

445. See Glennon, supra note 306, at 68–84 (describing how civil rights lawyers were crucial to success of boycott and formal legal victory). Glennon thus extrapolates that lawyers and law were primarily responsible for the boycott, rather than the boycotters themselves. It seems clear to me, however, that but for the activism of the locals, the lawyers would never have been positioned to achieve their legal victory. Notably, Jack Greenberg, who litigated the case, agrees with me on this point. See Greenberg, *Crusaders*, supra note 368, at 212–13 (describing how lawyers became involved only in aftermath of boycott to defend leaders from prosecution).

446. See Glennon, supra note 306, at 68–84 (explaining lawyers’ interactions with movement organizers).

447. Morris, *Origins*, supra note 342, at 51.

448. See Klarman, *Jim Crow*, supra note 27, at 385–442 (explaining backlash in Birmingham and resulting push for civil rights legislation); see also Fairclough, supra note 298, at 112–29 (detailing Birmingham protests and white reactions).

449. On the role of white violence in the evolution of the civil rights movement, see Klarman, *Jim Crow*, supra note 27, at 421–42.

450. See *id.* (describing role of white resistance in catalyzing legal change); see also Fairclough, supra note 298, at 225–51, 253–55, 265–66 (describing Selma protests and enactment of Voting Rights Act of 1965).

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ated by the image of vicious white southerners attacking peaceful blacks was immense.⁴⁵¹

The most successful episodes of the civil rights movement thus featured a two-pronged strategy for achieving change in which actors making moral claims for racial justice relied on lawyers and legislators to translate these claims into the language of law while the movement was affecting the hearts and minds of the public, or immediately afterward. “[T]he two approaches—legal action and mass protest—entered into a turbulent but workable marriage,” Professor Aldon Morris has explained.⁴⁵² Legal processes were an integral part of the overall process of achieving change, but they did not provide the initial spark that set in motion the chain of events that created this change. Rather, the “mass dramatization of injustice,” to quote King, lit the fire.⁴⁵³ The decisive political actors instigated legal change from outside of the law, rather than the law instigating political actors, which suggests that courts are reactive institutions that respond to sociopolitical currents.⁴⁵⁴

Consequently, rather than hewing to the traditional, lawyer-dominated impact litigation model, activists intent on ameliorating the caste-like inequality in education should mobilize outside the law if they hope to one day achieve leverage within the law. Suppose, for example, activists wished to tackle credentials bias from a social movement perspective. Under the interactive, temporally sensitive model of the relationship between social movements and law that I have described, activists initially would mobilize outside of the law to raise the political consciousness of client communities about the problem. The nature and extent of the problem that the movement would confront is clear. The majority of Americans, including a majority of Hispanics and a near-majority of blacks, think of quantitative measures and an applicant’s merit as interchangeable.⁴⁵⁵ These criteria are generally accepted in the culture (by

451. See Klarman, Jim Crow, *supra* note 27, at 434–36 (discussing reactions of President Kennedy, congressmen, newspaper editorialists, and northern public generally to images of brutality against Birmingham protestors). R

452. See Morris, *Origins*, *supra* note 342, at 39. The boycott “had created the pressure that contributed to the favorable court ruling.” *Id.* at 63. R

453. Martin Luther King, Jr., *Why We Can’t Wait* 42 (1964).

454. See Klarman, Jim Crow, *supra* note 27, at 449–50 (noting social and political influence on Supreme Court). R

455. Polls consistently show that Americans, including a near majority of blacks and a majority of Hispanics, believe it is unfair to give preferential treatment to minorities if doing so requires lowering “standards” such as test scores. See Steve Crabtree, *The Gallup Org., The Gallup Brain: Bakke and Affirmative Action*, Jan. 28, 2003, at <http://www.gallup.com/poll/content/?ci=7660> (on file with the Columbia Law Review) (“[H]istorical polling data show that Americans have an overall positive view toward ‘affirmative action’ and programs that increase opportunities for minorities, so long as these do not confer an unfair advantage for minorities in the form of ‘preferential treatment’ or ‘lower standards.’”). Among the findings in these polls are the following: In 2001, 66% of Americans favored quotas favoring racial minorities in employment and education, provided they meet the “same standards” as others. But only 18% favored such

educators, administrators, commentators, and students, among others) as intelligence tests—objective and reliable measures of aptitude.⁴⁵⁶ This is the case even though the test creators acknowledge that the measures are merely predictive and warn against their overuse⁴⁵⁷ because, for example, they capture and measure social status, as well as ability.⁴⁵⁸ This perception cripples many minority students, according to experts. The psychologist Claude Steele has studied a phenomenon that he terms “stereotype threat,” which he describes as the threat to the psyche of “being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype.”⁴⁵⁹ In turn, the lingering threat negatively influences minority students’ performance both on standardized tests and in the classroom.⁴⁶⁰ A substantial literature confirms that minority students’ perceptions that those in their learning environments have low expectations of them or are biased against them have a harmful impact on their experiences of education at every level.⁴⁶¹ The interplay of stereotype threat and the general cultural tendency to accept performance on quantitative measures of ability as reliable proxies for intelligence was apparent in *Grutter* and *Gratz*. The presiding judges, the university, and the plaintiffs apparently all accepted the validity of the criteria that the intervenors challenged as discriminatory.⁴⁶² Consequently, it is crystal clear that the first step in any campaign to eliminate racial castes in education must be consciousness raising and “cognitive liberation” about the validity of the tests themselves.

quotas even “if it mean[t] lowering the standards in order to make up for past discrimination” against racial minorities. Similarly, in 1977, 81% of Americans, when asked whether they supported preferential treatment to compensate for past discrimination, said that “ability, as determined by test scores” should be the decisive factor in employment and education decisions. Interestingly, the 1977 poll also showed that 53% of Americans would favor governmentally funded programs, free of charge, to help minorities perform better on standardized tests of ability. *Id.* The public’s opinions have not changed since *Grutter*. See Moore, Merit, *supra* note 60 (noting that 75% of white Americans and 69% of all Americans support merit-only admissions even if it results in few minority admissions, and that 44% of blacks and 59% of Hispanics agree).

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456. See, e.g., Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* 1, 317–40 (1994) (suggesting connection between racial IQ gap and systemic societal problems).

457. See *supra* notes 63–64 and accompanying text (highlighting relationship between notions of merit and attitudes toward race-conscious policies).

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458. See Sturm & Guinier, *supra* note 64, at 954 (noting that critics of affirmative action assume that selection process for employment and educational opportunities is “fair, meritocratic, and functional”).

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459. Claude Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, *Atlantic Monthly*, Aug. 1999, at 44, 46.

460. *Id.*

461. See, e.g., Feagin et al., *supra* note 379, at 1–20, 83–134 (discussing negative influence of peer and administration attitudes toward African Americans on minority students’ academic performance).

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462. See *supra* notes 110–115, 200 and accompanying text.

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Activists would next need to generate attention for their cause with a view toward creating political pressure on policymakers to embrace the movement's perspective on the issue. Parents might undertake sustained protests against the use of or overreliance on "ability grouping"⁴⁶³ or "high-stakes" tests,⁴⁶⁴ for example. Pressure on decisionmakers for change would follow if public attitudes about quantitative measures of ability changed substantially and noticeably, so much so that the media recognize and confirm the shift in opinion.⁴⁶⁵ It is only after such attitudinal changes occur or are under way that lawyers might successfully seek changes in law, whether judicially or legislatively (or both), that will preserve the attitudinal shifts created by extralegal activism.⁴⁶⁶ Ideally, litigation could be avoided altogether if activists conceive, evaluate, and then lobby for alternatives to the existing regime. The feasibility of admissions systems that rely less on test data, accept test scores on a voluntary basis, or accept alternative predictors of future success might be considered, for example. By employing such a strategy, activists would increase the likelihood that courts might some day take steps toward a less regressive distribution of educational opportunities.

CONCLUSION

By bringing historical and social science perspectives to bear on the legal literature on social movements, this Article has endeavored to add nuance to the scholarly conversation about how law mediates democracy. The *Grutter* intervenors' limited success—from a social movement perspective—despite their technical victory in the courts illuminates why juridical law should be deemphasized in discussions of sociopolitical change. The *Grutter/Gratz* paradigm confirms the disproportionate influence of moderates and elites in politics, on legal narratives about equality, and in juricentric constitutionalism. By implication, it also supports the view that there is little space in juridical law for agenda setting by those seeking to undermine the preferences of a majority. Thus, on balance, if lawyers hope to leverage the law to achieve the goals of socially and economically marginalized groups, their advocacy must be preceded by social movements that are not defined by juridical law. Such movements must function as independent political efforts, seeking to create a

463. See Oakes, *supra* note 177, at 10–11 (noting that minority and poor students "consistently score lower than do whites" on standardized tests and discussing reasons for inequality); Anne Wheelock, *Crossing the Tracks: How "Untracking" Can Save America's Schools 6–18* (1992) (discussing negative consequences of tracking for working-class and poor students).

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464. See *supra* notes 430–433 and accompanying text (considering bias in standardized tests).

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465. See *supra* notes 59–60 and accompanying text (discussing public attitudes about merit measures).

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466. See Klarman, *Decisions*, *supra* note 61, at B10 (arguing that *Roe v. Wade*, 410 U.S. 113 (1973), could not have had its outcome absent prior women's movement).

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political environment favorable to change. Hence, law should be the final arena of struggle over systemic social problems, rather than the first.

Nevertheless, my claims about the utility of law to social movements are limited. Progressive social movements should only be wary of juridical law if the movement's aim is to achieve fundamental social transformation, such as that encapsulated by the intervenors' redistribution goal. Constitutional litigation is a particularly ineffective tool for democratizing education by minimizing the discriminatory impact of credentials bias—unless the gain is to be achieved through loss. That is, the intervenors' effort to build a "new civil rights movement" might have achieved a more favorable political opportunity structure through defeat in both *Gratz* and *Grutter*. According to commentators and the intervenors themselves, such defeats would have resulted in the immediate resegregation of selective higher education. Had it occurred, the legal and political systems likely would have been under greater pressure to rectify the use of biased credentials in selective educational institutions than they are at present.

Finally, my thesis about the relationship between law and social movements is based largely on nineteenth- and twentieth-century race relations history, as well as social science literature that draws heavily on these movements as paradigms for analysis. Consequently, this Article's conclusions should be tested against the social and legal histories of similar and dissimilar movements and status groups—including conservative movements and countermobilizations. Positive and normative claims about constitutional law should rest on careful excavations of social movement history using the tool of social movement theory.

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